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EVERSLEY'S

LAW OF THE

DOMESTIC RELATIONS

HUSBAND AND WIFE
PARENT AND CHILD
GUARDIAN AND WARD
INFANTS
MASTER AND SERVANT

FOURTH EDITION

BY

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PREFACE.

THE law of Domestic Relations covers so wide a field that to bring the legal aspect of such a range of subjects up to date is no light task. The Mother of Parliaments has been unusually prolific of legislation of late years, and in the year 1925 effected probably a record output. Many important decisions have been added to the body of judicial authority, and those that possess a bearing on the subject of this work have been included here. Much of the law stated in the former editions has become obsolete, and by discarding this in the course of revision the book has been kept within a reasonable compass, notwithstanding the inclusion of much new matter. It is hoped that the result will be helpful to the practitioner in dealing with the various questions that he may be called upon to solve in connection with the family life of his clients.

The book follows a man throughout his life. Birth, marriage and death are naturally the outstanding events in his history. Not only with these, but with his domestic relations throughout life the law is closely linked. At the earliest stage his *status* at birth, depending on the validity of the marriage of his parents and the domicil he acquires, has to be considered. His maintenance and upbringing involve the duties and obligations of his parents and guardians, and their respective rights to his custody and control. Their privilege of deciding upon the religion in which he is to be brought up and the right of appointing guardians for him have been greatly modified by recent legislation. The question of his secular education also arises,

together with the powers his parents or guardians possess in regard to the application of his property for his maintenance and education. Then follow his disabilities as an infant, his general incapacity to enter into contracts, and, contrasted with this, his liability in regard to necessaries, his power to enter into agreements of service and to engage in trade, while not forgetting his privilege of repudiation, his option to ratify, and his freedom from the penalty of bankruptcy.

We must also follow him to the age when his wishes may be considered in the choice of his guardian, or his place of residence, the office he may hold, when he may be validly married, and how far he may be bound by his marriage settlement.

On attaining majority, the subject of his emancipation and the consequential results require consideration. Protection and assistance he will receive from the Courts in regard to calling upon his guardian for an account, in reviewing possible unconscionable bargains, in relief from the undue influence exercised by parent or guardian, and in the process of entering into possession of property hitherto held in trust for him.

The subject of the essential requirements of a valid marriage in England or abroad will probably soon be of personal importance to him. Breach of promise of marriage and the defences thereto, the action for seduction, and liabilities in respect of the maintenance of illegitimate children may of course concern him also. The subject of marriage settlements, whether the parties are infants or of full age, and the difference between ante-nuptial and post-nuptial settlements, must often be of cardinal importance. The liabilities of a married woman, her authority to pledge her husband's credit, the growth of the separate estate and the application of restraint on anticipation to her property, concern both the husband and the wife. Agreements for separation,

decrees of divorce, judicial separation and nullity will always affect some proportion of the population.

As years roll on the adult will usually have to consider in his turn his duties and obligations towards his own offspring. The insurance of himself, his wife and his children are also among the subjects dealt with here; as well as the mutual obligations of himself and his wife in respect of the maintenance of each other and their children, grandchildren and parents. His duties in respect of domestic servants employed by him find their place in this book, as they do in his life, and include the servants' "character," the terms of their employment, the question of injuries received or inflicted by them, their authority to contract for him, their dishonesty, together with the termination of their contracts of service.

Finally, the obligations at death of the surviving spouse or the executor or administrator in regard to burial, administration, and intestacy, all find their place in this book, which for many years has been successfully devoted to the legal relations of domestic life.

ALEXANDER CAIRNS.

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THE LAW OF THE DOMESTIC RELATIONS.

PART I.

HUSBAND AND WIFE.

CHAPTER I.

THE LEGAL CHARACTER OF MARRIAGE.

Marriage a Status and a Contract.—Whatever may have been the earliest form of human society, it is now generally accepted that the Family is the parent of social and political life, as it has existed from remote historic times down to the present period. The fundamental conception of the term "Family" is the union of a man and a woman, from which union spring other lives, bound together by common origin and affection. To this social nucleus were added in process of time strangers serving as slaves, and so was built up that social structure which found its widest development in the patriarchal life of the East and its severest in the stern *patria potestas* of ancient Rome. The marriage union was no mere temporary consorting together of man and woman, but from the time when human life began to crystallize into ordered form the union has among all the higher races been permanent and life long. It is only in the later stages of civilization, when woman has taken a more equal rank with man, that this bond has come to be more easily dissolved. Polygamy, or the taking of more wives than one, in no way affected the duration of the tie. The term marriage signifies the state of those who are bound by the marriage tie, but it is also and even more commonly used to signify the acts which go to create the tie.

The term "contract" has in modern times been generally applied to the relationship of those who enter the state or condition of matrimony, on account of the essential element of consent and agreement which is the basis of the transaction. But marriage is more than a contract, it is a *status*, the conditions of which are regulated for and not by those who enter it. When the marriage is perfected, the semblance of a mere contract is at an end. Accordingly, the Roman jurists did not discuss it under the head of obligations, but under *Status*, or the law of Persons. For convenience, and in imitation of eminent authors who have dealt with this subject, the term contract will be used to designate the relationship.

Marriage has been defined in various ways by various authorities. Thus, it is regarded as a status (*a*), an institution (*b*), as a consensual contract (*c*), as a religious bond (*d*), and as a purely civil engagement (*e*).

Definitions more or less formal have been propounded from time to time, as, for example, the following by Mr. Justice Story: "Marriage is a state or relation, depending for its existence upon the fact of parties competent to contract the relation, and their legally voluntary present consent to do so, with such formalities as the law of the place requires for its valid solemnization" (*f*).

The following definition has been formulated by another American writer, Bishop: "Marriage is the civil status of one man and one woman united in law for life, under the obligations to discharge to each other, and the community, those duties which the community by its laws holds incumbent on persons whose association is founded on the distinction of sex" (*g*).

The most authoritative definition in English law is that given by Lord Stowell in the following terms: "Marriage as understood in Christendom is the voluntary union for life of one man and one woman to the exclusion of all others" (*h*). It was adopted by Mr. Justice Chitty with the slight modification

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(*a*) *Niboyet* v. *Niboyet*, 4 P. D. 11; *Sotomayer* v. *De Barros*, 5 P. D. 101.

(*b*) Story, Conflict of Laws, s. 108 n; adopted by Lord Penzance in *Hyde* v. *Hyde and Woodmansee*, L. R. 1 P. & D. 130, 133; 35 L. J. P. 57.

(*c*) Digest Lib. 35, Tit. I. 15; Lib. 50, Tit. 17. 1. 30; *Dalrymple* v. *Dalrymple*, 2 Hag. Cons. 62.

(*d*) *Dalrymple* v. *Dalrymple*, 2 Hag. Cons. 63; and see *Lindo* v. *Belisario*, 1 Hag. Cons. 216.

(*e*) *Lindo* v. *Belisario*, *ubi sup.*

(*f*) Story, Conflict of Laws, s. 112 a.

(*g*) Law of Marriage and Divorce, s. 3.

(*h*) *Hyde* v. *Hyde and Woodmansee*, L. R. 1 P. & D. at p. 133; 35 L. J. P. 57.

which made it read, "to the exclusion of all other connubial unions" (*i*).

Mr. Justice Story, writing of the essential character of marriage, says: "I have throughout treated marriage as a contract, because this is the light in which it is ordinarily viewed by jurists, domestic as well as foreign. But it appears to me to be something more than a mere contract. It is rather to be deemed an institution of society founded upon the consent and contract of the parties; and in this view it has some peculiarities in its nature, character, operation, and extent of obligation, different from what belongs to ordinary contracts" (*k*). The married state is not itself a contract, but before that married state can be entered into, those who are about to enter it must agree or contract to do so; thus, while the state of marriage is not a contract, yet it is founded on a contract. Over the contract the parties have complete control (subject to each other's rights arising from it); but over the status they have no control, but must invoke the authority of the tribunals of their domicil to abrogate it or import any modification into it.

The contrast between marriage and an ordinary contract is made very manifest in the following judgment: "Marriage is a contract *sui generis*, and differing in some respects from all other contracts, so that the rules of law which are applicable in expounding and enforcing other contracts may not apply to this. The contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society. The status of marriage is *juris gentium*, and the foundation of it, like that of all other contracts, rests on the consent of parties; but it differs from other contracts in this, that the rights, obligations, or duties arising from it are not left entirely to be regulated by the agreement of parties, but are to a certain extent matters of municipal regulation, over which the parties have no control, by any declaration of their will. It confers the status of legitimacy on children born in wedlock, and with all the consequential rights, obligations, or duties thence arising; it gives rise to the relations of consanguinity and affinity; in short, it pervades the whole system of civil society. Unlike other contracts, it cannot in general, amongst civilized nations, be dissolved by mutual consent; and it subsists in full force even although one of the parties should be for ever rendered

(*i*) *Re Ullee, The Nawab Nizam of Bengal's Infants*, 53 L. T. R. 711.
(*k*) Conflict of Laws, s. 108 n.

incapable, as in the case of incurable insanity or the like, from performing his part of the mutual contract" (*l*).

The matrimonial law of this country is inapplicable to polygamous connections (*m*); and while an English subject retains his English domicil he cannot contract a valid marriage with the subject of a foreign country which permits polygamy, the marriage being carried out according to the forms and ceremonies (if any) of that country (*n*). The phrase "Christian marriage," "marriage in Christendom," or some equivalent phrase, has frequently been used in judgments respecting such marriages as the law of England will recognize as valid. But the principle expressed was that the only marriage recognized in Christian countries and in Christendom is that of one man and one woman, to the exclusion of all others (*o*). Thus, where a marriage took place between a British subject and a Japanese woman, and it was proved that they were validly married according to the laws of Japan, and that by those laws the husband was excluded from taking more than one wife, the marriage was held good (*p*).

Of late years a great change has taken place in English law in the matter of the religious element in matrimony. Formerly it was the prominent feature, but since the year 1836 (*q*) the civil aspect has predominated. The consensual nature of the marriage contract remains untouched; but while the offices of the clergy are retained, a religious ceremony of marriage is no longer an obligation in the eye of the law; and marriage is treated as a civil contract. The priest and registrar, and, more lately, an "authorized person" appointed by recognized Nonconformist bodies, are on the same level, and a State or official registrar or witness of the consent of the parties is now appointed for the purpose of affording a guarantee of propriety and regularity. By the law of England, then, the legal character of marriage as the inception of the matrimonial union is a consensual civil contract. But, as before pointed out, the effect of marriage is not merely that of an ordinary contract,

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(*l*) Per Lord Robertson (Primus) in the *Edmonstone*, *Levett*, *Forbes*, and *Ferguson* divorce cases, Court of Session, June 19, 1916; Faculty Collection, No. 54, Vol. 19, p. 139.

(*m*) Per Lord Penzance in *Hyde* v. *Hyde and Woodmansee*, L. R. 1 P. & D. 133; 35 L. J. P. 57.

(*n*) *Re Bethell*, *Bethell* v. *Hildyard*, 38 Ch. D. 220; 57 L. J. Ch. 487; *Brinkley* v. *Att.-Gen.* (1890), 15 P. D. 76; 59 L. J. P. 51, per Hannen, P.

(*o*) *Brinkley* v. *Att.-Gen.*, 15 P. D. 76; 59 L. J. P. 51.

(*p*) *Ibid.* See also *Ruding* v. *Smith*, 2 Hag. Cons. Rep. 390.

(*q*) 6 & 7 Wm. IV. c. 85.

for a new status is created between the contracting parties, which affects not only themselves but the society at large in which they have taken up their matrimonial abode.

Presumption in Favour of Marriage.—The marriage state being the chief foundation on which the superstructure of society rests, it follows naturally that the law, which is the expression of the sentiments prevailing among organized communities, assumes a favourable attitude towards it. The presumption of the law is clearly in its favour—*semper præsumitur pro matrimonio* (*r*). This presumption of law is much stronger than most other legal presumptions; it is not lightly to be repelled or broken in upon by a mere balance of probability, but the evidence for the purpose of repelling it must be strong, distinct and satisfactory. This statement of the rule of law, originally formulated with reference to the presumption of the legitimacy of a child born during wedlock in *Morris* v. *Davies* (*s*), was extended in *Piers* v. *Piers* (*t*) to the case of presuming the validity of a marriage shown to have taken place in fact. As originally formulated, it was that the rebutting evidence must be "strong, distinct, satisfactory and conclusive." Lord Brougham expressed a doubt as to the necessity and propriety of adding "conclusive" to the other conditions.

Every intendment shall be made in favour of a marriage *de facto*; and where an act appears to have been done by proper persons, the law will intend that everything was done in a proper manner—*omnia rite acta præsumuntur*. This legal presumption requires strong and satisfactory evidence to displace it; and mere absence of proof of the regularity of the marriage rites and ceremonies will not displace it (*t*). The more distant the date of the marriage the more readily will the maxim *omnia rite acta præsumuntur* be applicable. Accordingly, where a marriage was proved to have been solemnized *de facto* over a hundred years back by parties who intended that it should be a good marriage, and it was celebrated *bonâ fide* and openly, this maxim was held applicable (*u*). Again, mere irregularity in the form of the ceremony is not fatal to the validity of a marriage (*x*); and it is a rule that has pervaded the law of marriage, that directions as to the manner, and even prohibition, under a penalty *other than*

(*r*) *Steadman* v. *Powell*, 1 Add. 58.
(*s*) 5 Cl. & Fin. 163, 265.
(*t*) 2 H. L. Cas. 331.
(*u*) *The Lauderdale Peerage*, 10 App. Cas. 692.
(*x*) *Catterall* v. *Sweetman*, 1 Robert. 320.

nullity, do not necessarily imply a nullity (*y*)—that is, where the parties do not set at naught the rules dealing with the essentials of the contract. The force of this presumption is much heightened where it is proved that the parties (whose marriage is in question) distinctly intended to marry, and went through a form of marriage with that intent (*z*).

Presumption from Cohabitation.—The presumption of marriage arising from cohabitation and repute can only be rebutted by clear and satisfactory evidence (*a*). Thus, where a man and a woman have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together by virtue of a legal marriage, and not in concubinage (*b*). It has also been held that where a man and woman intended to be married and lived afterwards together as man and wife, their cohabitation was matrimonial and not concubinary, though it was impossible for a valid marriage between them to be directly proved (*c*). Again, where the parties have lived and cohabited together as man and wife for a long time after having gone through a form of marriage, intending to contract a valid marriage, and believing that they had done so, and facts are not brought forward to prove the contrary, general reputation is held sufficient evidence of marriage (*d*). Indeed, the Courts are astute to presume marriage where the matrimonial intent can be shown to exist (*e*). But this presumption of law in favour of marriage does not hold good under all circumstances. Thus, in criminal matters, as on a charge of bigamy, or in suits for dissolution of marriage, judicial separation, and restitution of conjugal rights, and the like, the fact of marriage must be strictly proved (*f*).

Conditions in Restraint of Marriage.—The policy of the law of England is eminently in favour of marriage; accordingly, conditions and contracts in respect of property which tend generally to restrain marriage are regarded with disfavour (*g*).

(*y*) Per Willes, J., in *Beamish* v. *Beamish*, 9 H. L. Cas. 274, 331; *The Lauderdale Peerage* (*ubi sup.*). See also Lord Blackburn's judgment in pp. 748, 749.

(*z*) *Piers* v. *Piers* (*ubi sup.*).

(*a*) *Piers* v. *Piers* (*ubi sup.*); *Hervey* v. *Hervey*, 2 Wm. Bl. 577.

(*b*) *Sastry Velaider Aregonary* v. *Sembecutty*, 6 A. C. 364; 50 L. J. P. C. 28.

(*c*) *Re Shephard, George* v. *Theyer*, [1904] 1 Ch. 456; 73 L. J. Ch. 401.

(*d*) *St. Devereux* v. *Much Dew Church*, 1 Wm. Bl. 366, in a note to which case the early authorities are collected; *Doe dem. Fleming* v. *Fleming*, 4 Bing. 266.

(*e*) See also *Wigley* v. *Solicitor to the Treasury*, [1902] P. 233; 71 L. J. P. 115; and *Haynes, In re; Haynes* v. *Carter*, 94 L. T. 431—Kekewich, J.

(*f*) *Morris* v. *Miller*, 1 Wm. Bl. 632; 4 Burr. 2057; Bull N. P. 28.

(*g*) *Woodhouse* v. *Shepley*, 2 Atk. 535; *Lowe* v. *Peers*, 4 Beav. 2232.

The restraint need not be absolute, but will be void if it has a probable tendency to check marriage (*h*).

The law upon this subject is intricate, and can hardly be propounded without some reference to the historical causes of the fluctuations of judicial opinion which are to be found in the reported cases. Principal among these causes is the fundamental difference on this point between the common law and the civil law, which latter was in large measure introduced into this country by the ecclesiastical courts at a time when they exercised jurisdiction in respect of matter testamentary. On one point, however, both systems of law appear to agree, namely, that attempts by testators or other donors to prohibit lawful marriage and promote celibacy cannot be aided by the Courts (*i*). Hence neither in the case of a devise of real property nor of the bequest of personalty can the gift be made to depend upon a condition that the donee shall not marry, or, being married, shall cease to cohabit with the lawful spouse. The leading case on this subject is *Scott* v. *Tyler* (*k*), in which Lord Thurlow said: "About the middle of the present century [the judgment was delivered in the year 1788] doubts occurred which divided the sentiments of the first men of the age. The difficulty seems to have consisted principally in reconciling the cases, or rather the arguments on which they proceeded. The better opinion or, at least, that which prevailed was that devises of land, with which the Canon Law never had any concern, should follow the rule of the Common Law; and that legacies of money, being of that sort, should follow the rule of the Canon Law. Land devised, charges upon it, powers to be exercised over it, money legacies referring to such charges, money to be laid out in lands (though I do not find that yet resolved), follow the rule of the Common Law, and such trusts are to be executed with analogy to it. Mere money legacies follow the rule of the Canon Law and all trusts of that nature are to be executed with analogy to that." For the purposes of the case before him the Chancellor proceeded to investigate the rules derived from the canon law, but it will be convenient in this place to deal first with the rule of common law.

(*h*) *Bellasis* v. *Ermine*, 1 Ch. Cas. 22; *Hicks* v. *Pendarvis*, 2 Eq. Cas. Abridg. 212; 2 Freem. 41; *Peyton* v. *Bury*, 2 P. Wms. 626, and cases there collected; *Keily* v. *Monck*, 3 Ridg. P. C. 205.

(*i*) *Jones* v. *Jones*, 1 Q. B. D. 279, at p. 282; *Bellairs* v. *Bellairs*, 18 Eq. Cas. 510, at p. 513.

(*k*) Dick, 712; 2 Bro. C. C. 431; 1 Wh. & T. L. C. 560.

A condition or an injunction which amounts to a prohibition of marriage, or which would tend to interfere with the performance of marriage duties, is held to be unenforceable, and therefore void (*l*). It is consequently of great importance to ascertain whether the void condition is a condition precedent on the performance of which the gift takes effect, or a condition subsequent, purporting to destroy an interest which has arisen out of the gift (*m*). A void condition cannot be the foundation of a valid devise, and therefore, if such a condition be a condition precedent, the gift itself will fail (*n*). On the other hand, a void condition subsequent will not, of course, avail to divest an existing interest.

It would not seem, however, that conditions falling short of total prohibition have been held illegal: A condition to marry a wife with competent fortune (*o*); not to marry a Scotchman (*p*); not to marry a woman who had been a domestic servant (*q*); to observe the marriage forms of the Quaker community (*r*). All these conditions have been held to be good in the case of landed property, and to them it would seem that the cases quoted below in connection with personal property, when such conditions are conditions precedent, may be added, for there would seem to be no difference, so far as conditions precedent are concerned, between the rule at law and the rule in equity. In *Hervey* v. *Aston* (*s*) and in *Bertie* v. *Falkland* (*t*) it is said that a condition precedent imposed upon a gift of lands will take effect and defeat the gift if impossible of performance. The case of *Keily* v. *Monck* (*tt*) is not inconsistent with this proposition, for although in that case the terms of the condition were not absolutely general, they were taken to amount, in effect, to a general prohibition of marriage.

It is in connection with bequests of personal property that the rules have become intricate. The law, as formulated by Lord Thurlow in the leading case, stands thus: "The Canon Law prevails in this country only so far as it hath been actually received with such ampliations and limitations as time and

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(*l*) *Lowe* v. *Peers*, 4 Burr. 2225; *Keily* v. *Monck*, 3 Ridg. P. C. 205; *Jones* v. *Jones*, 1 Q. B. D. 279, at p. 282.
(*m*) *Re Moore, Trafford* v. *Maconochie*, 39 Ch. D. 119.
(*n*) *Bertie* v. *Falkland*, 3 Chan. Cas. 129; 2 Vern. 333.
(*o*) *Leng* v. *Dennis*, 4 Burr. 4052.
(*p*) *Perrin* v. *Lyon*, 9 East, 170.
(*q*) *Jenner* v. *Turner*, 16 Ch. D. 188.
(*r*) *Haughton* v. *Haughton*, 1 Moll. 611.
(*s*) Com. 726.
(*t*) 2 Freem. 222.
(*tt*) 3 Ridg. P. C. 205.

occasion have introduced; and subject at all times to the municipal law. It is founded on the Civil Law, consequently the tenets of that law also may serve to illustrate the received rules of the Canon Law." The learned Chancellor then proceeded to outline the main provisions of the civil law on this point, and proceeded: "The ancient rule of the Civil Law has suffered much limitation in descending to us.

"The case of widowhood is altogether excepted by the novels; and injunctions to keep that state are made lawful conditions.

"So is every condition which does not, directly or indirectly, import an absolute injunction to celibacy.

"Therefore, an injunction to ask consent, as I have said before, is a lawful condition, as not restraining marriage generally.

"A condition not to marry a widow is no unlawful injunction, for the reason given before.

"So of an annuity to a widow during her widowhood.

"A condition to marry or not to marry Titius or Maevia is good for this reason that it implies no general restraint; besides, in the first case it seems to have a bounty to Titius or Maevia in view.

"In like manner the injunction which prescribes due ceremonies and the place of marriage is a lawful condition, and is not understood as operating the general prohibition of marriage.

"Still more is a condition good which only limits the time to twenty-one, or any other reasonable age, provided this be not evasively used as a covered purpose to restrain marriage generally. And this must obtain still more forcibly where the *lex loci* implies the same restraint.

"Nay, according to Godolphin, the use of a thing may be given during celibacy; for the purpose of intermediate maintenance will not be interpreted maliciously to a charge of restraining marriage.

"It seems also agreed on all hands that when on any condition, however restrictive of marriage, the legacy is given over to pious uses the intention of the party shall be deemed to regard those uses, and not to have aimed at the objectionable purpose of restraining marriage.

"As we receive the Canon Law a bequest over to any purpose or persons shall be interpreted in the same manner, and make a conditional limitation" (*u*).

(*u*) *Scott* v. *Tyler*, Dick. 712; 2 Bro. C. C. 431; 1 Wh. & T. 560.

Of these rules the most important by far is the last, which defines the effect of a gift over and makes the law as to bequests of personalty subject to that condition substantially conformable to the common law. But in annotating this judgment it will be convenient to follow the order of the text.

1. The rule restraining marriage of a widow. This rule has been followed in later cases (*x*), and has been extended so that it may now be formulated in general terms as applicable to a widower as well as to a widow (*y*).

2. Every condition which does not directly or indirectly import an absolute injunction to celibacy. This is not to be read as unqualified by the context; an interpretation which would assimilate the law of personal bequests to the common law. It has been taken in later judgments that the condition is only to be enforced when there is a gift over, so that this condition and the last condition, that as to gifts over, are to be read together, as will clearly appear when the detailed conditions enumerated in the succeeding clauses of the judgment are considered.

2 (a). An injunction to ask consent. The cases under this head are numerous, for the condition is of common occurrence and is frequently violated. That the condition without a gift over in case of forfeiture is not to be enforced is laid down in the early case of *Bellasis* v. *Ermine* (*z*); it is re-affirmed in the modern case of *Bellairs* v. *Bellairs* (1874) (*a*). The condition was held valid, there being a gift over, where the age was limited to twenty-one years, in *Stackpole* v. *Beaumont* (*b*), and an extension of the age to twenty-eight years was held a good condition in *Hemmings* v. *Munckley* (*c*) and treated as reasonable, and would, seemingly, have been upheld if the question had come up for decision in *Young* v. *Furse* (*d*). There seems to be no doubt that this condition, when it is made the condition of a gift over, will always be supported if the Court is of opinion that the donor has exercised a reasonable discretion in limiting the age of consent. On the other hand, a line of cases has thoroughly established the rule that, there being no gift over,

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(*x*) *Lloyd* v. *Lloyd*, 2 Sim. (N.S.) 255; 21 L. J. Ch. 596; *Pyle* v. *Price*, 6 Ves. 779; *Newton* v. *Marsden*, 31 L. J. Ch. 690.
(*y*) *Allen* v. *Jackson*, 1 Ch. D. 399.
(*z*) 1 Cas. in Ch. 22.
(*a*) L. R. 18 Eq. 510.
(*b*) 3 Ves. 89.
(*c*) 1 Bro. C. C. 304; 1 Cox, C. C. 38.
(*d*) 8 De G. M. & G. 756.

the condition will not be enforced but the gift be taken to be discharged from the condition (*e*).

2 (b). The condition not to marry a widow. This part of the rule must be taken to rest on the authority endorsed by Lord Thurlow's *dictum* in this place.

2 (c). An annuity during widowhood. The gift so expressed is made on a condition precedent which does not depend for its validity on a gift over (*f*). Hence such a gift may be made, not only during widowhood, but during celibacy (*g*).

2 (d). The condition to marry or not to marry a particular person. This rule, as stated in the judgment, would seem to be reminiscent of the case of *Bertie* v. *Falkland* (*h*), but as that case dealt with real estate only, it does not quite cover the case here put. But slightly extended, and therefore including the rule actually laid down, the law has been held to justify the following conditions: To marry into favoured families (*i*); not to marry a papist (*k*); to marry a conforming Jew of Jewish extraction (*l*). But in *W.* v. *B.* (*m*), where a decision on a very obscure will is summarily reported, a condition not to marry B. seems to have been violated but held ineffective; and in a note to pl. 2 on p. 110 of 1 Eq. Ca. Ab. it is said that a condition not to marry a person of a certain profession is void by our law. This statement, although it may be said to be to some extent countenanced by the view taken in *Keily* v. *Munck* (*n*), seems hardly consistent with recent decisions as cited above.

It is submitted that the rule may be somewhat more succinctly stated, and its bearing on the marriage relation made perfectly clear, if it is put in the form of five propositions as follows:

1. Attempts by donors to prohibit marriage (*o*).

(*e*) *Marples* v. *Bainbridge*, 1 Madd. 590; *Jervis* v. *Duke*, 1 Vern. 19; 1 Eq. Cas. Abridg. 110, pl. 1; *Garret* v. *Pritty*, 2 Vern. 293; *Lloyd* v. *Branton*, 3 Mer. 108; *Merlin* v. *Marsden*, 2 J. & H. 356; *Tricker* v. *Kingsbury*, 7 W. R. 652; *Re Whiting's Settlement*, [1905] 1 Ch. 96.

(*f*) *Lloyd* v. *Lloyd*, 2 Sim. (N.S.) 255; *Newton* v. *Marsden*, 2 J. & H. 356.

(*g*) *Heath* v. *Lewis*, 3 De G. M. & G. 954; *Potter* v. *Richards*, 24 L. J. Ch. 488; *Webb* v. *Grace*, 2 Ch. 701; *Barton* v. *Barton*, 2 Vern. 308; *Newton* v. *Marsden*, 2 J. & H. 356.

(*h*) 2 Vern. 334; 1 Eq. Cas. Abridg. 110, pl. 10; Salk. 231; 2 Freem. 220. See also *Jenner* v. *Turner*, 16 Ch. D. 188, and *Haughton* v. *Haughton*, 1 Moll. 611.

(*i*) *Randal* v. *Payne*, 1 Bro. C. C. 55.

(*k*) *Duggan* v. *Kelly*, 10 Ir. Eq. 295.

(*l*) *Hodgson* v. *Halford*, 11 Ch. D. 959.

(*m*) 11 Beav. 621.

(*n*) 3 Ridg. P. C. 205.

(*o*) *Morley* v. *Rennoldson*, 2 Hare, 580; *Jones* v. *Jones*, 1 Q. B. D. 279

2. Attempts to relax the marriage tie (*p*).

3. Attempts to promote irregular sexual relations are contrary to the policy of the law and will not be assisted by the Courts. Conditions framed with these objects are void.

4. At common law, and therefore when dowries or other conveyances of land are in question, a void condition precedent avoids the conditional gift; a void condition subsequent avoids the conditional limitation (*q*). In either case, conditions which restrict or control the choice of the beneficiary, but do not offend against the principle laid down in paragraphs 1, 2 and 3, will be enforced.

5. Equity follows the law in all cases in which the conditional gift is followed by a gift over (*r*) or alternative provision is made for the beneficiary (*s*). But if the condition is intended to divest a vested interest, and there is no express gift over or equivalent expression of the donor's intent to make an effective limitation, the condition will be ineffective, and the gift will be taken purged of the condition (*t*). Moreover, a condition, not being in set terms a limitation, will be construed in equity as a condition subsequent, even although expressed as a condition precedent. In that case the condition fails to take effect, and it may thus come about in equity that a void condition, being taken *pro non adjicta*, leads to a valid gift (*t*).

Contracts in Restraint of Marriage.—On like principles contracts in restraint of marriage, whether general or against marriage with a particular person, are void. But a covenant not to revoke a will made for good consideration is not necessarily against public policy as being in restraint of marriage and void (*tt*). On grounds of public concern and welfare, and that marriage should be free and unfettered for the benefit of society, the Courts will likewise refuse validity in some cases to bonds. A bond that a person should either marry a particular person or pay another a sum of money by way of forfeiture is void (*u*). So is a bond given by a widow payable if she should marry again, she receiving a bond payable to her if she should not marry again (*x*). In both cases the bonds were ordered to

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(*p*) *Cartwright* v. *C.*, 3 De G. M. & G. 982.
(*q*) *Egerton* v. *Brownlow*, 4 H. L. 1.
(*r*) *Whiting's Settlement*, [1905] 1 Ch. 96.
(*s*) *In re Nourse*, [1899] 1 Ch. 63.
(*t*) *Bellairs* v. *Bellairs*, 18 Eq. 510.
(*tt*) *Robinson* v. *Ommaney*, 21 Ch. D. 780; 51 L. J. Ch. 894.
(*u*) *Key* v. *Bradshaw*, 2 Vern. 102. (*x*) *Baker* v. *White*, 2 Vern. 215.

be delivered up to be cancelled. Marriage brocage contracts are illegal as tending to deceit and fraud (*z*). A marriage brocage contract is a bargain by one person for pecuniary reward to procure marriage for another, and it is immaterial whether such procuration is directed towards one particular individual or is intended to be general in its operation (*a*).

Upon similar principles of public policy, gifts providing for a future separation between husband and wife have been from early times held utterly void (*b*); because such gifts may tend to promote a separation of the married couple, and so cause scandal and offend against the feelings of society. Accordingly, where a testator bequeathed a legacy of £2 10*s*. a week to be paid to his sister during such time as she should live apart from her husband before his son attained the age of twenty-one for her maintenance whilst so living apart from her husband, it was held that such gift was altogether void, as its commencement and duration were contrary to the policy of the law (*c*).

(*z*) *Hall* v. *Potter*, Show. P. C. 76; *Turton* v. *Benson*, 2 Vern. 764; *Cole* v. *Gibson*, 1 Ves. Sen. 503. See the converse case of *Neville* v. *Wilkinson*, 1 Bro. C. C. 543, as modified by *Roberts* v. *Roberts*, 3 P. Wms. 66.

(*a*) *King* v. *Burr*, 3 Mer. 693; *Hermann* v. *Charlesworth*, [1905] 2 K. B. 123; 74 L. J. K. B. 620.

(*b*) *Brown* v. *Peck*, 1 Ed. 140; *Wren* v. *Bradley*, 2 De G. & Sm. 49; 17 L. J. Ch. 172.

(*c*) *Re Moore*, *Trafford* v. *Maconochie*, 39 Ch. D. 116; 57 L. J. Ch. 936.

CHAPTER II.

LEGISLATION CONCERNING MARRIAGE.

The Celebration of Marriage.—The law concerning marriage has in this country been so completely incorporated in statutes that the period prior to the Reformation can be disposed of in a word by saying that it has passed away leaving only the slight traces of the canon law which are recorded in the preceding chapter. Down to that point, and, indeed, later, down to the latter part of the eighteenth century, there were three methods of celebrating marriage in England:—

(1) By solemnization in facie ecclesiæ.—The requisites of this kind of marriage were: publication of banns or the obtaining of an episcopal licence dispensing with banns; the performance of a religious ceremony; and, where the marrying couple were minors, the consent of the proper parties.

(2) By clandestine celebration. — Clandestine marriages entered into without banns or licence, consent of guardians, or regard to time or place; all that was necessary was the presence of a priest before the Reformation, or a person in holy orders after the Reformation.

(3) By mere consent.—"Herein lies the peculiarity of the old English law when viewed in contradistinction to the ancient Continental law. By the general law of Europe, prior to the Council of Trent, a consensual marriage was in all respects absolutely perfect. By the law of England a consensual marriage was good only for certain purposes. It did not give the man the right of a husband in respect of the wife's property, it did not impose on the woman the disabilities of coverture, nor render her dowable, it did not confer on the issue legitimacy, nor did it make the marriage of either of the parties (living the other) with a third person void, though it did make it voidable. Nevertheless, consensual marriages in England were indissoluble (*a*). The parties could not release each other, and either could compel solemnization *in facie ecclesiæ* (*b*).

(*a*) *Jesson* v. *Collins*, 2 Salk. 437; S. C. 6 Mod. 155.
(*b*) *Bunting* v. *Lepingwell*, 4 Rep. 29 *a*.

A reform which dates from the Tudor period and may be credited to the Reformation was the law enabling the clergy to marry. This was effected by two statutes passed in the reign of Edward the Sixth (*c*). The second statute was passed merely to clear up doubts which had arisen concerning the effect of the first, the two together serving to confer not only the personal right to marry on the clergyman, but establishing his right to curtesy, his widow's right to dower, and the full legitimacy of the offspring of the marriage. These Acts were indeed repealed in the first year of Queen Mary's reign (*d*), and remained repealed during the reign of Elizabeth. But they were renewed by a reviving enactment in the first Parliament of James I. (*e*), and have continued, with this interval of suspension, to be the source of the law upon this point to the present day. The history of clerical celibacy in England will be found in considerable detail in the opinion of the judges delivered in the House of Lords and reported in *Beamish* v. *Beamish* (*f*).

Lord Hardwicke's Marriage Act, 1753.—Society in the middle of the eighteenth century was so demoralized that there were many more clandestine than regular marriages, and matters came to such a pass that the Legislature deemed it necessary to intervene and check the abuses; and not without considerable difficulty and bitter opposition did Lord Hardwicke's measure, "An Act for the better prevention of clandestine marriages" (*g*), pass into law. Blackstone styled this Act "an innovation upon our ancient laws and constitution" (*h*). The necessity for the presence of a clergyman is taken for granted in this Act; and its only aim and scope was to prevent and discountenance clandestine and improvident marriages. Its chief provisions were: Mere consensual marriages should not be compelled by writ in the ecclesiastical courts to be celebrated *in facie ecclesiæ* (*i*). All marriages celebrated in any other place than a church or public chapel of the parish in which the parties dwelt, unless by special licence, or without publication of banns, or the ordinary's licence, should be null and void; and the parties celebrating should be liable to fourteen years' transportation (*k*). Marriages were to be celebrated openly in church in the presence of at least two witnesses (*l*), after publication of

(*c*) 2 & 3 Edw. VI. c. 21, and 5 & 6 Edw. VI. c. 12.
(*d*) By 1 Mary, sess 2, c. 2.
(*e*) 1 Jas. I. c. 25, s. 50.
(*f*) 9 H. L. Cas. 274.
(*g*) 26 Geo. II. c. 33.
(*h*) 1 Com. 438.
(*i*) 26 Geo. II. c. 33, s. 13.
(*k*) Sect. 8.
(*l*) 26 Geo. II. c. 33, s. 15.

banns on three consecutive Sundays (*m*), unless dispensed with by special licence (*n*), or upon the ordinary's licence (*o*); and where the contracting parties were minors, consent of parents or guardians was necessary to the validity of the marriage (*p*). The marriages of members of the royal family (*q*), and of Jews and Quakers (*r*), were not affected by this Act. The validity or invalidity of the latter marriages seems to have been purposely left to the operation of the old law; and the balance of authorities seems clearly in favour of their validity even before the passing of this Act. The operation of the Act was confined to England.

An ordained minister of the Church of England in the parish church was now made the necessary responsible and official witness of the consent of the parties, which was to be publicly given. He was also the witness of the regularity of the service, and of the sanction of those interested in the marriage; he was to be the medium of publishing the fact of the intended nuptials, and was required to keep a proper and accredited record of the celebration. This Act, though introducing praiseworthy certainty in the formation of the marriage tie, and reducing the possibility of clandestinity to a minimum, went, as was natural, to the opposite extreme of harshness, and was productive of much hardship and injustice. Nullity was procurable with a terrible facility, and members of non-conforming denominations were compelled to come to the churches of the Establishment if they desired to contract a valid marriage. Illegitimate children, too, were hardly treated, for if, as minors, they desired to marry, they were obliged to go to the Court of Chancery for the appointment of guardians to give the necessary consent, for they had no parents who in the eye of the law could either give their consent or appoint guardians for them. There was no provision regulating marriages contracted out of the country, and persons to avoid the irksome restraints imposed upon them went across the border, and so brought about the scandals of Gretna Green.

The Marriage Act, 1823 (4 Geo. IV. c. 76).—It was, therefore, thought necessary, after a lapse of seventy years, to institute fresh legislation, viz., the important Act of 4 Geo. IV. c. 76 (repealing Lord Hardwicke's Act and 3 Geo. IV. c. 75); and this statute, save where it has been altered and modified by subse-

(*m*) Sect. 1. (*n*) Sect. 6.
(*o*) Sect. 8. (*p*) Sect. 11.
(*q*) Sect. 17. (*r*) Sect. 18.

quent enactments, governs the majority of marriages in England. Its more important provisions are as follows: Clergymen who have duly solemnized marriage, after publication of banns, between persons both or one of whom shall be under age, without the consent of the proper parties, are to be no longer punishable unless they have had notice of dissent of such proper parties; and if such dissent is openly and publicly expressed at the time of publication, the marriage is to be null and void (*s*). Banns are to be republished if the marriage is not celebrated within three months of their publication (*t*). In the case of unmarried minors, the father, or guardians, or mother (if unmarried), are the proper parties to give consent (*u*); and if such be *non compotes mentis,* or beyond seas, application for consent must be made to the Lord Chancellor, &c. (*x*). Instead of the former penalty of nullity, the punishment for procuring a marriage by licence, or after publication of banns without the consent of proper parties, by one of the parties to the marriage where both or one of them shall be under age, by perjury or fraud, is forfeiture by the guilty party of all advantages of property accruing from such marriage (*y*). The most important alteration effected by this Act is the limiting of void marriages to those cases in which any person shall knowingly and wilfully intermarry in any other place than a church, &c., wherein banns may be lawfully published, unless by special licence, or shall knowingly and wilfully intermarry without due publication of banns, or a licence obtained from the proper person, or shall knowingly and wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders (*z*). This Act, like that of Lord Hardwicke, does not extend to the marriages of the royal family (*a*), or of Quakers, or Jews (*b*).

The Marriage Act, 1836 (6 & 7 Wm. IV. c. 86).—The Act of 1823 was most useful in its reform, but left untouched the hardship (and one much complained of) of requiring persons not in communion with the Church of England to have recourse to her churches in order to contract a valid marriage. Thirteen years after its passing, by Lord John Russell's Act,

(*s*) 4 Geo. IV. c. 76, s. 8.
(*t*) Sect. 9.
(*u*) Sect. 16.
(*x*) Sect. 17.
(*y*) Sect. 23. For a fuller treatment of forfeiture under this section, see *post*, chap. iv.
(*z*) 4 Geo. IV. c. 76, s. 22.
(*a*) Sect. 30.
(*b*) Sect. 31.

this grievance was partially removed; and for the first time in the history of English law, whether ecclesiastical or civil, the purely temporal and civil element of marriage is recognized (*c*). Now no longer is the intervention of a priest or parson in holy orders necessary; no longer is episcopal licence or publication of banns an essential element; and no longer are the parties required to attend the churches of the Establishment to make their unions regular and valid. It is enough if the parties go before the appointed civil officer—the registrar—give the requisite notices, and procure his licence or certificate, and are married before him and two other witnesses at his office, or in places properly registered for the solemnization of marriage (except churches and chapels of the Church of England), with or without any form or ceremony (*d*); or are married before a properly authorized person other than the registrar in the presence of at least two witnesses under the provisions of the Marriage Act, 1898 (*e*).

The Marriage Act, 1898.—This Act removes the grievance which pressed heavily on dissenters. Full directions as to the carrying out of such marriages are contained in the Statutory Rules and Orders made under the authority of the Act in 1909. The more important provisions are as follows: Notice of all marriages (except those intended to be solemnized according to the rights of the Church of England after publication of banns or by special or ordinary licence (*f*)) must be given to the superintendent registrar of the district in which one of the parties lives (*g*). The registrar may, after the expiration of twenty-one days after the entry of such notice, grant his certificate, and after one whole day grant his licence (*h*); and the certificate or licence is to be given to the officiating minister (if any) at the time of the solemnization of the marriage (*i*). If the parties intending to be married object to a religious service they can be married at the registrar's office (*k*). If the marriage is intended to be solemnized with religious rights other than

(*c*) The details of this statute will be given more fully in chap. .

(*d*) The registration of places of worship not belonging to the Established Church for solemnizing marriages is provided for by section 18.

(*e*) 61 & 62 Vict. c. 58, ss. 4, 6 (2) (3). See further essential requirements of Nonconformist marriages, p. 61, *post*.

(*f*) 6 & 7 Wm. IV. c. 85, s. 11. The consent of the clergy of the Church of England to marry on the registrar's certificate or licence is not obligatory, but optional; 19 & 20 Vict. c. 119, s. 11.

(*g*) 19 & 20 Vict. c. 119, s. 6.

(*h*) Sects. 4, 9.

(*i*) 6 & 7 Wm. IV. c. 85, s. 16.

(*k*) Sect. 21.

those of the Church of England it must be celebrated in a properly registered building before the authorized person (*l*). The parties can always require the attendance of the registrar if they please (*m*). The parties must, during the ceremony, declare in the presence of the authorized person that they take each other as husband and wife (*n*). Proper register books and returns must be made (*o*). The Act of 1856 enacts, with regard to the marriages of Quakers or Jews, that, where the parties thereto are both Quakers or both Jews, any such marriage may be solemnized by licence, and provides for the registration of Jewish marriages by a Synagogue official (*p*), and the Act of 1898 does not apply to such marriages (*pp*).

If any authorized person refuses or fails to comply with the regulations of the Marriage Act, 1898, or the enactments or regulations for the time being in force with respect to the solemnization and registration of marriages, he shall be guilty of a statutory offence and liable to certain punishments (*q*). If the certificate or licence has been fraudulently obtained, and marriage follows, the guilty persons are visited with the penalties inflicted by 4 Geo. IV. c. 76, s. 23 (*r*).

(*l*) 61 & 62 Vict. c. 58, s. 4.
(*m*) Sect. 10.
(*n*) Sect. 6.
(*o*) Sect. 7.
(*p*) 19 & 20 Vict. c. 119, ss. 21, 22.
(*pp*) Sect. 13.
(*q*) Sect. 12.
(*r*) 6 & 7 Wm. IV. c. 85, s. 43.

CHAPTER III.

IMPEDIMENTS TO MARRIAGE.

Canonical and Civil Disabilities.—There are two kinds of disabilities constituting impediments to lawful and valid marriage, namely—canonical and civil. According to English law, there is an important distinction between the two in the effect they have upon the marriage. The canonical disabilities, such as . . . certain corporal infirmities only make the marriage *voidable*, and not *ipso facto* void, until sentence of nullity be obtained; and such marriages are esteemed valid unto all civil purposes, unless such sentence of nullity is actually declared during the lifetime of the parties. Civil disabilities, *e.g.*, prior marriage, want of age, idiocy, and the like (and now relationship within the prohibited degrees) make the contract void *ab initio*, not merely voidable; these do not dissolve a contract already made, but they render the parties incapable of contracting at all (*a*); and any union formed between the parties is not matrimonial.

English law does not recognize as an impediment to marriage the fact that a person is under vows of celibacy, or the fact that a foreigner who marries here is by the law of his own country under a disability to contract a marriage on account of his religion, as in the case of a Hindu marrying outside his caste (*b*); or by reason of the fact that a person is the guilty party in a divorce suit in his own country and on that account under a disability to marry until the innocent party in the divorce suit is re-married (*c*), unless the disability is not confined to the guilty party and is for a fixed period (*d*).

Void marriage.—A marriage is termed void, when it is good for no legal purposes; and its invalidity may be maintained in any proceeding, in any court, between any parties, whether in the lifetime or after the death of the supposed husband and wife, and whether the question arises directly or collaterally (*e*).

(*a*) *Elliott* v. *Gurr*, 2 Phill. 16.
(*b*) *Chetti* v. *Chetti*, [1909] P. 67.
(*c*) *Scott* v. *Att.-Gen.*, 11 P. D. 128; 55 L. J. P. 57.
(*d*) *Warter* v. *Warter*, 15 P. D. 152; 59 L. J. P. 87.
(*e*) Bish. Mar. and Div. s. 105, citing Shelford, Mar. and Div. 479-483.

The grounds on which marriage is held void *ab initio* are based on public policy, and are not peculiar to the contracting parties; they are also mostly the subject of statutory enactments.

Voidable marriage.—A marriage is voidable, when in its constitution there is an imperfection which can be inquired into only during the lifetime of both of the parties in a proceeding carried on for the very purpose of obtaining a sentence declaring it null. The term "voidable" implies an option to the parties to treat the relationship between them as binding or not binding. Until set aside, it is valid for all civil purposes (*f*); when set aside, it is rendered void from the beginning (*g*). This distinction between void and voidable arose from the interference of the temporal courts, under 32 Henry VIII. c. 38, which in such cases prohibited the spiritual courts from bastardizing the issue after the death of one of the parties . . . for void is voidable *ab initio* (*h*).

These disabilities form grounds for suits for nullity of marriage, that is, for pronouncing the marriage null and void; but are treated under this heading, because, though necessarily raised after the ceremony of marriage has taken place, yet when proved they are held to be obstacles or impediments to a valid marriage.

Jurisdiction of the Divorce Court.—The jurisdiction in these suits for nullity belonged exclusively to the ecclesiastical courts; but on the passing of 20 & 21 Vict. c. 85, such jurisdiction was transferred to the new court, called "the Court for Divorce and Matrimonial Causes," and is now vested in the High Court (*hh*).

Domicil is not necessary to found this jurisdiction in nullity suits, and matrimonial residence within the jurisdiction is sufficient to give the Court power to pronounce decrees of nullity (*i*). The only substantial defence to suits for nullity is a denial of the facts that go to constitute the ground of nullity: thus, cruelty or adultery is no defence in such suits.

Proceedings to annul void marriage.—Where a void marriage has been contracted any person having a sufficient interest in having it annulled may commence proceedings except on the ground of impotence for nullity; thus, on the ground of the

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(*f*) 1 Bl. Com. 434.

(*g*) Bish. Mar. and Div. s. 105, citing *Elliott* v. *Gurr* (*ubi sup.*); *P.* v. *P.*, [1916] 2 Ir. R. 400.

(*h*) See *Ray* v. *Sherwood*, 1 Curt. 173, 188.

(*hh*) Supreme Court of Judicature Consolidation Act, 1925.

(*i*) *Roberts* (f. c. *Brennan*) v. *Brennan*, [1902] P. 143; 71 L. J. P. 74; *Ogden* v. *Ogden* (otherwise *Philip*), [1908] P. 46; 77 L. J. P. 34.

poor-law liability to support grandchildren such a suit may be brought by a father (*k*); or a mother if a widow (*l*). In the case of *Bevan* v. *McMahon* (*k*) it was held that a suit for nullity of a child's marriage which had abated through the death of the father could not be revived either by the widow or the executor, but since the Married Women's Property Act, 1882, the widowed mother would have the right to continue the suit. Such suit may also be brought by the guardian of a minor properly appointed for that purpose (*m*).

Impotence.—The only canonical disability now recognized is the impotence of both or one of the parties to consummate the marriage through some bodily defect (*n*). Marriage having been ordained for the procreation of children, a capacity for consummating it is implied in the marriage contract. Consummation is one of the essential duties for which the parties stipulate, and the incapacity of either party to satisfy that duty affords a ground for nullifying the contract (*o*). It has also been said of marriage that as its first cause and reason ought to be the design of having an offspring, so the second ought to be the avoiding of fornification (*p*). Thus, if either of the parties is unable to satisfy the proper and reasonable expectations of the other, the Courts will relieve, not only on the ground that the full terms of the contract cannot be carried out, but also that the law will never compel two persons to live together under such perilous conditions. Impotence has been defined as consisting "in the incapacity for copulation, or in the impossibility of accomplishing the act of procreation" (*q*).

A suit for nullity, grounded on this disability, must be brought during the lifetime of the parties, and is no ground for impeaching the validity of the marriage after the death of either of the parties (*r*). It is only open to the parties to the marriage (*s*), either of whom may set up the impotence of the other as a ground for nullity, but neither may set up his or her own impotence for the purpose of dissolving the marriage (*t*).

(*k*) *Ray* v. *Sherwood*, 1 Moo. P. C. 396; *Bevan* v. *McMahon* (f. c. *McMahon*), 28 L. J. P. & M. 127.

(*l*) 45 & 46 Vict. c. 75, s. 21.

(*m*) See *Wells* v. *Cottam* (f. c. *Wells*), 33 L. J. P. & M. 41.

(*n*) *B.* v. *M.*, 2 Rob. Eccl. Rep. 580. It may be mentioned that the Code Civil does not recognize this as a ground for annulling a marriage.

(*o*) *Dalrymple* v. *Dalrymple*, 2 Hag. Con. Rep. 54, 62.

(*p*) Ayliffe, Par. 300; *Briggs* v. *Morgan*, 3 Phill. 324.

(*q*) *Shelford*, Mar. and Div. 202.

(*r*) *A.* v. *B. and another*, L. R. 1 P. & D. 559.

(*s*) *P.* v. *S.*, 37 L. J. P. 80.

(*t*) *Norton* v. *Seton*, 3 Phill. 147.

There must be an *impotentia copulandi* on the part of the man or of the woman, proceeding from malformation, frigidity, disease, or some other like cause. It may arise from invincible repugnance (*tt*), or mere nervousness or hysteria on the part of the woman, and where it is found that consummation is practically hopeless nullity will be decreed (*u*). The impediment must exist at the time of the marriage, and be incapable of cure without endangering life (*x*). Impotence supervening after marriage is no ground for nullity, though arising from causes having their origin before marriage (*y*). If the impotence be accidental, the presumption is that it began *after* marriage; if natural, the presumption is the reverse (*z*). If there is a possibility that its cause may be removed, though such cure is highly improbable, the Court will not decree a sentence of nullity (*a*), if by delay and adoption of reasonable medical means the cure may be effected (*b*). There need not be any structural impediment to consummation, provided it is practically impossible (*c*); and it appears that nullity may be decreed on the ground of the sexual organs admitting only of partial connection (*d*), but not on the ground of incapacity to conceive from the removal of the ovaries where intercourse was possible (*e*). As a general rule, the Court will not grant a decree of nullity for impotence, whether arising from malformation or other cause, unless an order to inspect the respondent has been extracted from the registry at the instance of the party seeking for a decree; and if the husband is charged with impotency, the Court usually requires a medical certificate to the effect that the woman is *virgo intacta* and *apta viro* (*f*); but where the suit is grounded on the malformation of the wife, the inspection of the husband is not usually ordered (*g*). Where there has been persistent refusal to consummate a marriage on the part of one of the spouses (who also refuses to obey an order for medical inspection) while the other spouse has been anxious and willing that there should be con-

(*tt*) *G.* v. *G.*, [1924] A. C. 349; *R. G.* v. *J. G.*, 93 L. J. P. C. 163.
(*u*) *G.* v. *G.*, L. R. 2 P. & D. 287. *P.* v. *L.* (f. c. *P.*), cited in *S.* v. *A.* (*otherwise S.*), 3 P. D. 72.
(*x*) *Dease* v. *Aveling*, 1 Rob. Eccl. Rep. 279; *B.* v. *B.*, 1 Eccl. & Adm. Rep. 248; *Williams* v. *Williams*, 30 L. J. P. M. & A. 73.
(*y*) *Brown* v. *Brown*, 1 Hag. Eccl. Rep. 523; *Briggs* v. *Morgan*, 3 Phill. 324.
(*z*) *Brown* v. *Brown* (*ubi sup.*).
(*a*) *Stagg* v. *Edgecombe*, 32 L. J. P. M. & A. 153.
(*b*) *Welde* v. *Welde*, 2 Lee, 578.
(*c*) *G.* v. *G.* (*ubi sup.*); *H.* v. *P.* (f. c. *H.*), L. R. 3 P. & D. 126.
(*d*) *Dease* v. *Aveling* (*ubi sup.*).
(*e*) *L.* v. *L.* (*otherwise D.*) (1922), 38 T. L. R. 697.
(*f*) *Pollard* v. *Wybourn*, 1 Hag. Eccl. Rep. 727.
(*g*) *B.* v. *L.* (f. c. *B.*), L. R. 1 P. & D. 639; 38 L. J. P. & M. 35.

summation, the Court will assume the existence of some latent impediment amounting to incapacity (*h*). Wilful and wrongful refusal of marital intercourse is not of itself sufficient to justify the Court in declaring a marriage to be null by reason of impotence (*i*). Recent cases, however, establish an inference that where a wife has not had intercourse with her husband after a reasonable time for consummation of the marriage, such refusal is due to a want of capacity (*k*). In such a case the petitioner must bring the suit within a reasonable time; not too soon, because the repugnance or scruples of the respondent may be overcome, nor after the lapse of many years, as, for instance, nine years, for the Court would infer that there had been acquiescence in the state of affairs of which complaint is made (*l*).

The Court will decline to pronounce a marriage invalid on the unsupported evidence of one of the parties (*m*), yet if the respondent withdraw himself or herself from out of the jurisdiction, any statements admitting non-consummation can be received as evidence of it (*n*). Where one of the parties to a suit for nullity has made a statement to another person concerning marital relations, that party may be asked whether he or she communicated to that person the fact of his or her spouse's objection to marital intercourse (*o*). The calling on the respondent to submit to an operation is not a condition precedent to the petitioner's right of decree (*p*). In suits of this nature, the onus of proof lies on the complaining party (*q*).

Triennial cohabitation.—What is known as "triennial cohabitation" is generally required before suits of nullity on

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(*h*) *F.* v. *P.* (f. c. *F.*), 75 L. T. 192; *B.* (*otherwise H.*) v. *B.*, [1901] P. 39; *W.* v. *W.*, [1912] P. 78; 81 L. J. P. 29; *Finegan* v. *Finegan* (*otherwise McHardy*) (1917), 33 T. L. R. 173.

(*i*) *Napier* v. *Napier*, [1915] P. 184; 84 L. J. P. 177; per Pickford, L.J., at p. 181: "Wilful and wrongful refusal not arising from an antecedent incapacity is a matter arising after the marriage. It would not have been a ground of nullity in the Ecclesiastical Courts, and therefore cannot be so now"—*Finegan* v. *Finegan*, *supra*.

(*k*) *S.* v. *A.* (*otherwise S.*), L. R. 3 P. & D. 72; 47 L. J. P. 75; *G.* v. *G.*, L. R. 2 P. & D. 287; 40 L. J. P. & M. 83; *Vickery* v. *Vickery*, 37 T. L. R. 173; *Graham* v. *Graham*, [1924] A. C. 349, wife's invincible repugnance, paralysing will power; *S.* v. *S.* (*otherwise M.*) (1908), 24 T. L. R. 253; *F.* v. *F.* (1911), 27 T. L. R. 429; *C.* v. *C.* (1911), 27 T. L. R. 421.

(*l*) *S.* v. *A.* (*otherwise S.*) (*ubi sup.*). But see *B.* v. *M.*, 3 Rob. Eccl. Rep. 580, and *S.* v. *B.* (falsely called *S.*) (1905), 21 T. L. R. 219 (where seventeen years elapsed between marriage and decree).

(*m*) *U.* (f. c. *J.*) v. *J.*, 37 L. J. P. M. & A. 7.

(*n*) *Sparrow* v. *Harrison*, 3 Curt. 16; S. C. *Harrison* v. *Harrison*, 4 Moo. P. C. 96.

(*o*) *O'H.* v. *O'H.*, 33 T. L. R. 51.

(*p*) *W.* v. *H.*, 30 L. J. P. M. & A. 73.

(*q*) *Cuno* v. *Cuno*, L. R. 2 H. L. (Sc.) 300.

this ground can be brought (*r*), or an order for an inspection granted (*s*). So where a wife brought her suit for nullity on the ground of the impotence of the husband after cohabitation for two years and ten months without consummation, there being no visible defect in either, the Court suspended its decree, but subsequently, on proof of cohabitation of the parties without consummation, made the decree (*t*). This period is required by the law as being a reasonable and sufficient time to ascertain whether it is mere coyness or nervousness in either of the parties, or whether there is any physical incapacity. Such triennial cohabitation need not have existed uninterruptedly, but sufficiently to satisfy the requirements of the Court on the subject (*u*); but it has been held that where the interruption was for a considerable period, a corresponding period of cohabitation must be made up beyond the expired period of three years so as to complete three years in which the parties must have been living as man and wife (*x*). This rule as to triennial cohabitation is not a hard-and-fast one to be applied in every case, but is relaxed where it is discovered that there is a natural malformation or physical infirmity apparent to the medical inspectors (*y*). It only applies where the impotency is left to be presumed from continual non-consummation; for where the impotency can be plainly proved *aliunde*, the Court will never resort to it (*z*). Thus, where impotency can be at once ascertained, triennial cohabitation is not required (*a*); and a decree was granted where, after a cohabitation of two years and ten months, consummation was found impracticable on the part of the woman, though there was no structural defect (*b*). When once the fact is established that consummation is practically impossible, the petitioner should be prompt in seeking relief

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(*r*) *Sparrow* v. *Harrison*, 3 Curt. 27; S. C. *Harrison* v. *Harrison*, 4 Moo. P. C. 96; *Welde* v. *Welde*, 2 Lee, 578.

(*s*) *Aleson* v. *Aleson*, 2 Lee, 556; *Briggs* v. *Morgan*, 3 Phill. 329.

(*t*) *M.* (f. c. *H.*) v. *H.*, 34 L. J. P. M. & A. 12.

(*u*) *Sparrow* v. *Harrison* (*ubi sup.*).

(*x*) *Welde* v. *Welde*, (*ubi sup.*).

(*y*) *Scott* v. *Jones*, 2 Not. Cas. 36.

(*z*) *D.* (f. c. *F.*) v. *F.*, 34 L. J. P. M. & A. 66.

(*a*) *Briggs* v. *Morgan* (*ubi sup.*); *G.* v. *T.*, 1 Eccl. & Adm. Rep. 389, where there had been only *three months'* cohabitation with a husband impotent from incurable malformation.

(*b*) *G.* v. *G.*, L. R. 2 P. & D. 287; 40 L. J. P. & M. 83; and see *L.* v. *L.*, 7 P. D. 16; 51 L. J. P. 23. In this case there had been cohabitation for two years and eight months, and the wife might have undergone an operation with no great risk, but refused to do so.

from the Court, and sincere in the motive for so doing; and suits brought *alio intuitu* will be dismissed (*c*).

Delay.—Delay, coupled with insincerity and unaccounted for, operates as a fatal bar to the suit (*d*). But mere delay, however long continued, is no bar to a suit for nullity on this ground provided the impotence of the respondent is proved (*e*), and no particular number of years constitutes a bar where there are not other circumstances besides the question of time operating against the promoter (*f*). Thus, in *Pollard* v. *Wybourn* (*g*), twelve years had elapsed; in *Sparrow* v. *Harrison* (*h*), sixteen years; in *Castleden* v. *Castleden* (*i*), twenty-one years; and in a recent case (*k*), seventeen years. But, of course, where there is great delay there must be strict proof of the impotence, and the Court will require to be satisfied as to the sincerity of the petitioner (*l*).

Misconduct.—Where the petitioner has been guilty of adultery, but on the discovery of the misconduct has instituted a suit for nullity of marriage, and proves the impotence of the respondent, such misconduct does not amount to a want of sincerity so as to disentitle the petitioner to a decree of nullity (*m*).

An agreement between husband and wife (though not under seal) to live apart and not sue each other for any cause, either at law or in equity, based upon the impotence of one of them, will be a bar to a suit for nullity, if the respondent has observed the terms of the agreement (*n*).

The King's Proctor is now enabled to intervene in suits for nullity; and the Court will not, except for very special circumstances, shorten the period of time for a decree absolute to a less period than six months (*o*).

Consequential Relief.—Where the marriage was declared void on account of the impotence of the husband, the wife was held entitled to a charge on the husband's farm, which had been paid off by her marriage portion (*p*).

(*c*) *M.* (f. c. *C.*) v. *C.*, L. R. 2 P. & D. 414; 41 L. J. P. & M. 37; *Cuno* v. *Cuno*, L. R. 2 H. L. (Sc.) 300; *W.* (f. c. *R.*) v. *R.*, 1 P. D. 405.
(*d*) *B.* v. *B.*, 1 Eccl. & Adm. Rep. 248.
(*e*) Per Lord Chelmsford in *Cuno* v. *Cuno* (*ubi sup.*).
(*f*) See *B.* v. *M.*, 2 Rob. Eccl. 585. (*g*) 1 Hag. 725.
(*h*) 3 Curt. 27. (*i*) 9 H. L. Cas. 185; 31 L. J. P. & M. 103.
(*k*) *S.* v. *B.*, falsely called *S.* (1905), 21 T. L. R. 219.
(*l*) *S.* (*otherwise G.*) v. *S.*, [1907] P. 224; 76 L. J. P. 118.
(*m*) *M.* (*otherwise D.*) v. *D.* (1885), 10 P. D. 75; 54 L. J. P. 68.
(*n*) *Aldridge* v. *Aldridge* (*otherwise M.*), 13 P. D. 210; 58 L. J. P. 8.
(*o*) 36 & 37 Vict. c. 31, s. 1; *M.* (f. c. *B.*) v. *B.*, L. R. 3 P. & D. 200; 43 L. J. P. & M. 42.
(*p*) *P.* v. *P.*, [1916] 2 I. R. 400.

Want of consent founded on Error, Fraud, and Duress.—There is another kind of impediment which renders marriages affected by it voidable, viz., want of consent on the part of both or one of the parties to the marriage, on the principle *consensus non concubitus facit matrimonium.* In a marriage of this kind there is at the time of the solemnization an apparent consent, but the consent is not that of a person who is absolutely a free agent, but, on the contrary, is that of a person who is under compulsion, or who is intentionally deceived as to the essentials of the contract. This impediment exists where the marriage is brought about under circumstances of *Error*, *Fraud*, and *Duress*. Some text-writers have held marriages so celebrated to be void, but the cases dealing with them go to show that they are to be classed in the category of voidable; for in each of them either a Bill was introduced into the House of Lords to dissolve the marriage, or a suit was promoted in the Ecclesiastical Court to declare it null and void. That which is null and void *ab initio* does not require the sentence of any tribunal to set it aside and declare it null. There is good sense in this, for what the law does not prohibit private individuals may acquiesce in or waive; and the consent which has been tricked or wrung out of a person may afterwards be freely and voluntarily given, and the original imperfection cured. If cohabitation and the birth of children follow on a marriage so obtained, the Divorce Court will be very loath to pronounce it null and void. But, as was said by the Court in *Mather* v. *Ney* (*q*), if the marriage be void *ab initio*, as offending against a statutory provision, no length of time can render it valid; cohabitation and the birth of children would not make it any the less invalid. Another test may be applied: the validity of any such marriage could not be tried in any purely lay tribunal, but only by suit for nullifying the marriage brought by one of the parties in the Divorce Court; for if the parties themselves did not question the validity, third parties, whether directly or indirectly, could not do so, for *semper præsumitur pro matrimonio.*

Error.—The canonists enumerated four kinds of *error*, which formed grounds for nullifying a marriage affected by them—viz., *Error Personæ; Error Conditionis; Error Fortunæ;* and *Error Qualitatis* (*r*).

Error Personæ is where one person is substituted for another.

(*q*) 3 M. & S. 265.
(*r*) Ayl. Par. 362, 363.

This is a good ground for having a marriage set aside under circumstances of fraud. If a person is so tricked at the marriage ceremony, the marriage would be declared null and void (*s*). The party who is guilty of the fraud will not be allowed to avail himself of his own wrong; but the party whose consent is fraudulently obtained in this manner may by subsequent cohabitation cure the imperfection and render the marriage good for all purposes. But a mere mistake of name would be no ground for relief; and where a man courts a woman whom he thinks to be someone else, and in a totally different position to that in which she really is, and he marries her, believing her to be that other woman, the marriage is valid, for he intends to marry the woman with whom he goes through the ceremony (*t*).

Error Conditionis was where a man, thinking to marry a free woman, marries a bond woman.

Error Fortunæ was where one thinking to marry a rich spouse has in truth married a poor one.

Error Qualitatis was where a man believing a woman to be a virgin or of noble birth discovers her to be no virgin or of mean birth.

But these last three mistakes are not now grounds for nullifying a marriage, for they are mistakes as to accidentals and not essentials; even fraud practised as to the spouse's family is immaterial; a man who thinks to wed a duke's daughter but finds he is united to a scullion's drab has no redress (*u*). Concealment by a woman from her husband at the time of her marriage that she is then pregnant by another man does not render the marriage null and void (*x*); that is to say, antenuptial incontinence on the part of a woman is no more a ground for nullifying her marriage than the like incontinence on the part of the husband (*y*); and it is immaterial whether such incontinence has resulted in pregnancy or not. A fraudulent pretence that her husband was the cause is no more material than concealment of pregnancy (*z*). Even where one of the parties is a victim of a deliberate plot leading to a most disproportionate marriage as regards rank, fortune and habits of life, the Court

(*s*) See Lord Campbell's remarks in *Reg.* v. *Millis*, 10 Cl. & F. 785, as to persons married in masquerade, whose marriages would not be held valid.

(*t*) *Beau Fielding's Case*, Howell's State Trials, vol. xiv., p. 1327.

(*u*) See *Wakefield* v. *Mackay*, 1 Phill. 134 *n.*

(*x*) *Moss* v. *Moss* (*otherwise Archer*), [1897] P. 263; 66 L. J. P. 154; *Lang* v. *Lang*, [1921] S. C. 44.

(*y*) *Moss* v. *Moss*, *supra*.

(*z*) *Lang* v. *Lang*, *supra*.

cannot grant relief if there has been a capacity to consent, and that consent has been given (*a*).

Fraud.—The marriage contract is the most important a man can enter into, and public policy requires that it shall be honestly made and carried through; so the law interferes where from dishonest motives a marriage is fraudulently brought about, to which one of the contracting parties gives but an unwilling assent. In the case of persons of tender age the Court will readily interfere to redress a wrong; but in the case of adults the fraud perpetrated must be in respect of the essentials and not mere accidentals of the marriage tie to entitle the defrauded party to set the marriage aside (*b*). Thus it has been laid down that, apart from any question of duress or force, where there is considerable weakness of mind circumvented by proportionate fraud, whether practised on his ward by a party who stands in the relation of guardian (*c*), or by a trustee on his *cestui que trust*, over whom he has obtained a great ascendency (*d*), the marriage so brought about will be set aside (*e*). Marriage brought about by a conspiracy may, under certain circumstances, be set aside, as where two or more conspire to make another person drunk, who while in that state is made to go through the form of marriage (*f*).

Where the fraud is brought about by a conspiracy, but the party against whom the marriage is sought to be set aside was not one of the conspirators, but was ignorant of the fraud, the Court would not pronounce the marriage invalid (*g*). Where marriage is the voluntary act of a person, though brought about by the machinations of other persons, it is good for all purposes and cannot be set aside; thus, though a very young man, even under age, but capable of consenting, is entrapped by a deliberate plot conceived by designing persons into a marriage with a person socially much beneath him; yet, if he consent, the Court will not relieve, for his consent is his own act, however induced (*h*).

(*a*) *Sullivan* v. *Sullivan*, 2 Hag. Con. Rep. 238, 248.
(*b*) See *Wakefield* v. *Mackay* (*ubi sup.*).
(*c*) *Harford* v. *Morris*, 2 Hag. Con. Rep. 423.
(*d*) *Earl of Portsmouth* v. *Countess of Portsmouth*, 1 Hag. Eccl. Rep. 355.
(*e*) So in the case of *Miss Turner*, *Rex* v. *Wakefield*, 2 Lew. Cr. Cas. 1; 69 Ann. Register, 316; *Turner's Nullity of Marriage Bill*, 17 Hans. Parl. Deb., N. S. 1133.
(*f*) See *Sullivan* v. *Sullivan*, 2 Hag. Con. Rep. 238; *Gore* v. *Gibson*, 13 M. & W. 623.
(*g*) See *Rex* v. *Inhabitants of Birmingham*, 8 B. & C. 29; 6 L. J. (o.s.) (M. C.) 67.
(*h*) See *Sullivan* v. *Sullivan* (*ubi sup.*).

Fraud as to the spouse's family or fortune is no ground for setting the marriage aside. "A man who means to act upon such representations should verify them by his own inquiries. The law presumes that he uses due caution in a matter in which his happiness for life is so materially involved, and it makes no provision for the relief of a blind credulity however it may have been produced" (*i*). So, too, a false representation by a woman that she is a virgin and chaste, when in reality she is not a virgin but a prostitute, is not a ground for setting a marriage aside (*k*).

Fraud which brings about a mistaken notion in one party to the marriage as to the character, fortune, or health of the other party does not render the marriage void, for such are the accidentals and not essentials of the contract (*l*). The party whose consent has been obtained by fraud may, by subsequent cohabitation, cure the original defect, and render the marriage good for all purposes.

The party guilty of the fraud will not be allowed to avail himself of his own wrong.

Duress, or Force.—Duress is that harsh constraint which is illegally applied by one person to another, and may be either corporeal or mental. Corporeal is where the constraint takes the form of blows, rough usage, or confinement; and mental, where threats or menaces or terrorising acts and words are used. A marriage brought about by duress is *de facto* a marriage, and cannot be avoided until proved to be purely the effect of compulsion, and not the result of a choice (unbiased by fear) between the consequences of compliance or refusal; but there must be an absolute unwillingness in the breast of the party coerced, though the lips speak the words of consent (*m*).

It has been debated whether a marriage brought about by compulsion is void *de facto* as well as *de jure*, so that it does not need the sentence of any Court to pronounce it invalid, or whether it is voidable only. The better opinion would seem to be that it is voidable only; for the want of consent may be purged away by subsequent and spontaneous cohabitation, from which the true matrimonial consent may be inferred. Any con-

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(*i*) Per Lord Stowell in *Wakefield* v. *Mackay*, 1 Phill. 134 *n*.
(*k*) See *Perrin* v. *Perrin*, 1 Add. Eccl. 1; *Reeves* v. *Reeves*, 2 Phill. 125.
(*l*) *Wakefield* v. *Mackay* (*ubi sup.*).
(*m*) "Si patre cogente ducit uxorem quam non duceret, si sui arbitrii esset contraxit tamen matrimonium quod inter invitos non contrahitur maluisse hoc videtur." See Com. Dig. Baron et Feme (B 6).

tract void *ab initio* is as though it never existed, and cannot be ratified, whether the avoiding of such contract depend on its being contrary to public policy or the result of direct statutory provision.

" It has sometimes been said that in order to avoid a contract entered into through fear, the fear must be such as would compel a person of ordinary courage and resolution to yield to it. I do not think that is an accurate statement of the law. Whenever, from natural weakness of intellect or from fear, whether reasonably entertained or not, either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger. Whether the cause assigned for the mental condition is adequate or not is immaterial. The difficulty consists not in any uncertainty of the law on the subject, but in its application to the facts of each individual case " (*n*).

Fear of some untoward circumstance happening (not necessarily to the party coerced, but to some third person whose interests are a concern to the party coerced) is a necessary ingredient. Thus, where a young girl was taken away from school, hurried about from place to place abroad, and then married by one of her guardians, the marriage was set aside on the ground of fraud and duress; and it was laid down that if the girl acted under terror at a time when the marriage was solemnized, that was a reason for setting it aside (*o*). So, too, in the case of another young girl enticed away from school and married at Gretna Green in consequence of a lying tale told her of her father's desperate straits, and of his certain ruin unless she married the conspirator who had taken her off, which tale she believed, and in her terror acted on, the marriage was set aside by a Bill introduced into Parliament (*p*). The mere undesirableness and even impropriety of the match, though brought about by a considerable degree of pressure, is not a ground for pronouncing the marriage null and void, if evidence of the want of free consent is lacking. A young lady, eighteen years of age, entitled to considerable property (her parents being

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(*n*) Per Butt, J., in *Scott* v. *Sebright*, 12 P. D. 24; 56 L. J. P. 11, based on Ayl. Par. 362; Shelf. Mar. & Div. 214; and Bish. Mar. & Div. s. 211.

(*o*) *Harford* v. *Morris*, 2 Hag. Con. Rep. 423; *Bartlett* (f. c. *Rice*) v. *Rice*, 72 L. T. 112.

(*p*) *Turner's Nullity Bill*, 17 Hans. Parl. Deb., N. S. 1133; *Rex* v. *Wakefield*, 2 Lew. Cr. Cas. 1; 69 Ann. Reg. 316.

dead), spending her holidays at the house of one of the executors named in her father's will, whom she considered as her guardian, was induced by his brother (a man of fifty-two years of age), who was residing in the same house, to promise to marry him; a few days afterwards she withdrew that promise, but was importuned again and prevailed upon to renew it. The marriage was celebrated without the knowledge of any of her friends, upon a false statement made by the husband as to her age and residence in the publication of the banns and in the marriage register. There was no cohabitation or consummation. After a few days she went to a friend's house, and by his advice applied for an Act to annul the marriage. The introducer of the Bill for annulling the marriage refused to move its second reading as it did not appear in evidence that the marriage was not celebrated with the free consent of the wife, and the Bill was lost (*q*).

The strongest case to be found in the books of relief granted on the ground of duress is a recent one, in which the doctrine has been carried further than in any of the earlier decisions; indeed, considering the facts of the case and the course taken in its conduct (the respondent offering no evidence in contradiction, except on one particular) the decision can hardly be regarded as satisfactory and applying the leading principles to be followed. The learned President of the Probate and Admiralty Division (Sir C. P. Butt) felt a doubt whether all the facts had been made known to him; but, notwithstanding that doubt, he felt at liberty to act on the facts that were before him (*r*). They disclosed that the petitioner, a young woman twenty-two years of age, and not a person of weak mind or apparently of an impressionable nature, had got herself into money difficulties, and though she may not have desired to marry the respondent at the exact time she did, yet she was not unwilling to get herself out of the pecuniary scrape by marrying him. The learned judge found that she had been reduced by mental and bodily suffering to a state in which she was incapable of offering resistance to coercion and threats by the respondent, which in her normal condition she would have treated with contempt, and that there never was any such consent on her part as the law requires for the making of a contract of marriage.

In a later case the Court, acting on the principle that where

(*q*) *Field's Nullity Bill*, 2 H. L. Cas. 48.
(*r*) 12 P. D. 21; 56 L. J. P. 11

a person of full age and sound mind has gone through the ceremony of marriage publicly in the presence of witnesses, who discovered nothing in her demeanour to suggest constraint, and had complied with the formality of signing her name and answering questions without apparent difficulty or compulsion, held that very clear and cogent evidence must be given before the presumption of consent can be rebutted and the marriage annulled, and declined to set aside the marriage, though the petitioner, a young woman of twenty-five years of age, was of a weak and impressionable character and without much power of resistance to a stronger will, and the respondent had suddenly taken her into church after saying, "You must come into the church and marry me, or I will blow my brains out, and you will be responsible." The petitioner went through the marriage ceremony without showing any signs of unwillingness, repeated the responses in an audible tone, and signed the register in a clear, firm hand. After the ceremony the respondent took the petitioner home, and left her at the door of the house. The marriage was never consummated, and the parties never saw each other afterwards, though they corresponded, but always on the footing of cousins (as they were) and not as husband and wife (*s*). But in still later cases the Court has gone back upon the principles laid down by Lord Hannen in *Cooper* v. *Crane*. In *Ford* (f. c. *Stier*) v. *Ford* (*t*) the petitioner at the time of her marriage with the respondent was seventeen years old. The respondent was a friend of her brother, who had met her only a few times, and had never spoken of marriage or professed affection for her. She alleged that one day her mother, who was a woman of strong character and had great influence over her daughter, took her to a church where the respondent awaited her, and with him she went through the marriage ceremony, but afterwards threw away the wedding-ring. She said she thought the ceremony was that of mere betrothal, and would not have gone through it except under the influence of her mother. The parties never consummated the marriage, for the respondent left her at the church door, and sailed the same day for South Africa, where on his arrival he told the petitioner's brother of the marriage. No mention of the marriage was made to her father or in the family. Sir Gorell Barnes on these facts granted a decree for nullity. This case does not present the

(*s*) *Cooper* (f. c. *Crane*) v. *Crane*, [1891] P. 369.
(*t*) [1896] P. 1.

necessary ingredients of duress; no threats of damage or harm were made; her father was alive and capable of protecting her; and it was remarkable that a girl of seventeen mistook the ceremony of marriage for one of betrothal, especially when it is remembered that a formal betrothal is almost unknown in this country. In *Hall* (otherwise *Barrar*) v. *Hall* (*u*) the Court pronounced a decree of nullity in a case where the marriage ceremony was gone through at a register office, both parties being about twenty-four years of age, the petitioner not knowing that she was going through a ceremony of marriage, but thinking that they were merely putting their names down to be married in the future. The marriage had never been consummated. In *Valier* v. *Valier* (*w*), an Italian met a woman in a London night club, was induced by her to go through the ceremony of marriage at a register office, she making all the arrangements and pretending that it was a mere form and amounted to betrothal only, although after the ceremony, on her telling him he was now her husband, he said he would be a good husband. On his representation to the Court that he did not understand he was going through a ceremony of marriage he obtained a decree of nullity. He had visited her three times since the ceremony.

Abduction.—If a man by force takes away or detains against her will any woman of any age with intent to marry her (and whether he marries her or not is immaterial), he may be indicted for abduction (*x*).

Civil Disabilities.—The other impediments to marriage, or grounds for nullity, are civil, and their operation is to make the marriage void, and not merely voidable. Suits grounded on civil impediments may be brought by interested parties other than those who have gone through the ceremony of marriage; while a suit grounded on an allegation of impotence or of want of free consent can be brought only by the person who alleges that he or she suffers from the injury done by the non-consummation of the marriage, or that his or her consent has been obtained by some mistake or fraud or coercion. These impediments are (1) Nonage; (2) Insanity; (3) Consanguinity and Affinity, or Relationship within the Prohibited Degrees; (4) Previous Marriage.

(*u*) (1908), 24 T. L. R. 756.
(*w*) At present only reported in Times newspaper, July, 1925.
(*x*) 24 & 25 Vict. c. 100, s. 54.

(1) Nonage.—Nonage, or want of age of the contracting parties, operates to render the marriage void, on the twofold ground of a want of consent and the immaturity of the bodies or body of both parties or of one party to the engagement. The English law, following the canon law, has fixed the age of matrimonial consent at fourteen in the male and twelve in the female, on the assumption that the sexes are at those respective ages capable of appreciating the responsibilities and performing the duties of marriage. By the common law persons may marry at any age, and if they marry under the age of consent, they are husband and wife till disaffirmance.

The question whether marriages contracted between persons under the age of consent are void or voidable is not without some difficulty, for there are expressions in some of the authorities which warrant the assumption that at the utmost such are only voidable. It seems, however, to be clear law now that as contracts *per verba de præsenti* or *de futuro* cannot be enforced, marriages of infants under seven must be absolutely void. The law on this subject may be shortly summed up thus: (a) Where both parties or one are or is under seven years, the marriage is absolutely void; (b) where both parties are above seven and under fourteen and twelve respectively, the marriage is imperfect and inchoate, depending for its validity on the consent of both on reaching the respective marriageable ages; and in case of one of them being above fourteen or twelve, on the consent of that party who is under the marriageable age on reaching that period; (c) where the parties are above fourteen and twelve respectively, and one or both under twenty-one, the marriage is clearly good, with or without the consent of parents or guardians (*y*).

In 1885 the Criminal Law Amendment Act (*z*) was passed, making carnal connection with a girl under thirteen a felony (*a*), and carnal connection with a girl between thirteen and sixteen a misdemeanour (*b*). But these provisions do not alter in any way the common law age of consent to marry; and the connection in both cases must be "unlawful," which is the word governing the constitution of the offences; and as that which is permitted by the law is not "unlawful," the connection of the sexes following on a marriage recognized by the law, though

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(*y*) The consent of proper parties is discussed in the next chapter, "The Essentials of a Valid Marriage," p. 47.

(*z*) 48 & 49 Vict. c. 69. (*a*) Sect. 4. (*b*) Sect. 5.

the wife may be within the ages specified in the Act, is not unlawful and so not criminal.

(2) Insanity.—Insanity, or want of reason, is a bar to marriage on the ground that as without consent there can be no contract, so where there is no reason there is no power to consent. Mere weakness of understanding is not enough, but there must be mental derangement evidenced by overt acts and conduct of the imbecile or lunatic (*c*). The difficulty in all these cases, as in other branches of the law, is to determine what the true state and capacity of the intellect of the alleged imbecile or lunatic was at the time of the marriage. The ceremonies required by law, such as the publication of banns and the like, being complied with, when the hands of the parties are joined together, and the clergyman pronounces them to be man and wife, if they understand that by that act they have agreed to cohabit together, and with no other person, they are married (*d*). If the evidence shows that the mind was diseased, the Court will not inquire into the extent of the derangement consequent upon the disease. On this point Lord Penzance says: "If any contract more than another is capable of being invalidated on the ground of the insanity of either of the contracting parties, it should be the contract of marriage, an act by which the parties bind their property and their persons for the rest of their lives" (*e*). But in a later case, Sir J. Hannen said that "the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend. . . . I agree . . . that a mere comprehension of the words of the promises exchanged is not sufficient. The mind of one of the parties may be capable of understanding the language used, but may yet be affected by such delusions or other symptoms of insanity, as may satisfy the tribunal that there was not a real appreciation of the engagement apparently entered into" (*f*). In another case the wife obtained a decree of nullity on the ground of the grandiose delusions as to his *persona* entertained by the respondent at the time of the marriage (*g*). Each case must be decided on its own facts; but one of the tests of the capacity to understand the nature of the contract is the absence or presence of

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(*c*) *Earl of Portsmouth* v. *Countess of Portsmouth*, 1 Hag. Eccl. Rep. 355.
(*d*) *Harrod* v. *Harrod*, 2 Kay & J. 4; 18 Jur. 85.
(*e*) *Hancock* (f. c. *Peaty*) v. *Peaty*, L. R. 1 P. & D. 335; 36 L. J. P. & M. 57.
(*f*) *Durham* v. *Durham*, 10 P. D. 82.
(*g*) *Forster* (*otherwise Street*) v. *Forster*, 39 T. L. R. 658.

morbid delusions on the subject of marriage (*h*). The insanity must have existed at the time of the alleged marriage; for if it supervene after the marriage is contracted it will form no ground for nullity (*i*). A valid marriage may be entered into in a lucid interval, between two periods of madness or imbecility, provided the individual has not been found lunatic by a commission (*k*). If a lunatic so found by inquisition marries before he is declared of sound mind, the marriage is null and void by statute (*l*).

The question whether marriages contracted by lunatics or imbeciles can be made good and valid by acquiescence in them on the return of reason, without going through a further ceremony, has not been debated much of late. Shelford says: "There is authority for the proposition that a marriage by a *non-compos*, when of unsound mind, is rendered valid by consummation during a lucid interval" (*m*). It might, however, be argued that the policy of the law, which should protect the weak against the strong, would be against such a contention; and that a ratification of that which never was a contract is no ratification at all, and does not make a contract exist, and Wood Renton says, in reference to this proposition, that by the time of Lord Stowell it was clearly established that marriage, being a consensual contract, could only be entered into by persons who were capable of consent (*n*), and concludes that the real test of capacity was that laid down in *Harrod* v. *Harrod* (*o*).

A person on recovering sanity may institute proceedings to set aside a marriage had when *non-compos*; and if insanity at the time of the formation of the contract is proved, the marriage will be declared void (*p*). A suit may be brought by a guardian to set aside the marriage of one who was imbecile or of weak mind (*q*); but the Court will not pronounce its decree without the sanction of the petitioner; it will, however, proceed to try the issue of sanity or insanity raised before it. The proper course to raise the point of restoration to sanity is by motion for the

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(*h*) *Durham* v. *Durham*, 10 P. D. 82; *Hunter* v. *Edney*, 10 P. D. 93. See *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549; 39 L. J. Q. B. 237.
(*i*) *Parnell* v. *Parnell*, 2 Hag. Con. Rep. 169.
(*k*) *Turner* v. *Meyers*, 1 Hag. Con. Rep. 414. See *Hancock* v. *Peaty* (*ubi sup.*).
(*l*) 51 Geo. III. c. 37.
(*m*) Mar. and Div. 197, citing *Ashe's Case*, Prec. Ch. 703; Freeman, C. C. 259.
(*n*) Lunacy, 1897, p. 97.
(*o*) *Supra.*
(*p*) *Turner* v. *Meyers*, 1 Hag. Con. Rep. 414.
(*q*) *Wilkinson* v. *Wilkinson*, 4 Notes of Cas. 295.

Court to vacate its order appointing a committee on the ground of the lunatic's recovery (*r*). But as the marriage is void if the insanity of either party is proved, the question whether one of the parties was insane or capable of contracting can be litigated in proceedings to which neither is a party, and after the death of either or both; thus if a man has gone through the ceremony of marriage with a woman who was insane, and on her death claims her property *jure mariti*, her next-of-kin could raise the question of the invalidity of the marriage in an action brought to determine the ownership of her property (*s*). Suits for nullity on this ground are not common, and are usually brought by or on behalf of the person alleged to be insane at the time of the marriage.

Where the insanity is proved to be permanent, the burden of proof that the lunatic was sane at the time of the marriage is cast upon the person alleging the sanity; otherwise the burden of proof lies on the person alleging the insanity (*t*). Where the suit is brought not on behalf of the alleged lunatic but by the other party to the contract, the burden of showing that the respondent was insane at the time of the marriage lies on the party asserting it (*u*); and if the capacity to understand the nature of the contract is not impaired by such a mental condition as melancholia, the presence of such an affliction does not entitle the petitioner to a decree of nullity (*x*).

Marriages of lunatics so found by commission.—The marriages of persons found to be lunatics by commission are governed by 51 Geo. III. c. 37 (*y*), which enacts that "in case any person who has been, or at any time hereafter shall be, found a lunatic by any inquisition taken or to be taken by virtue of a commission under the great seal of Great Britain or the great seal of Ireland respectively, or any lunatic or person under a frenzy, whose person and estate by virtue of any Act of Parliament now or hereafter shall be committed to the care and custody of particular trustees, shall marry before he or she shall be declared of sane mind by the Lord High Chancellor of Great Britain or Ireland . . . or such trustees as aforesaid, or the

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(*r*) *Hancock* (f. c. *Peaty*) v. *Peaty*, L. R. 1 P. & M. 335; 36 L. J. P. & M. 57.

(*s*) See also definition of "Void Marriage," *ante*, p. 20.

(*t*) *Le Geyt* v. *O'Brien*, Milw. Ir. Eccl. Rep. 325.

(*u*) *Durham* v. *Durham*, 10 P. & D. 80; *Hunter* v. *Edney*, *ibid.* 93; *Jackson* (*otherwise Macfarlane*), [1908] P. 308; 77 L. J. P. 147.

(*x*) *Cannon* v. *Smalley* (*otherwise Cannon*), 10 P. & D. 96.

(*y*) This re-enacted 15 Geo. III. c. 30, and extended its provisions to Ireland.

major part of them respectively, as the nature of the case shall require, every such marriage shall be and is hereby declared to be null and void to all intents and purposes whatsoever."

Drunkenness.—Drunkenness at the time of the marriage may or may not be a ground for nullity; and it depends upon the circumstances surrounding the inception of the contract whether the results flowing from it are not modified by them. A person intoxicated, though not absolutely dead-drunk, may enter into a valid contract, provided fraud and trickery were not used to accomplish it (*z*). Drunkenness producing *delirium tremens* from time to time, but not proper or permanent insanity, does not throw upon those who desire to support the marriage the burden of proof that the person so affected was capable of forming the contract (*a*). The case is different where the marriage is celebrated while one of the parties is in a state of frenzy or *delirium tremens* proceeding from excessive drinking (*b*). The general law of Scotland and of the United States is similar on these points (*c*); and in those countries it is held that a marriage celebrated during the drunkenness of both or either of the parties will be held good, if acquiesced in, and not disclaimed on the return of reason and sobriety.

Deaf and Dumb Persons.—Deaf and dumb person may contract a valid marriage, and the presumption of the Court is in favour of such marriage, and casts the burden of proof of incapacity upon persons impeaching the marriage; and the Court will not grant an issue to try the validity of the marriage, merely upon a suggestion of insanity unsupported by evidence (*d*).

(3) Relationship within the Prohibited Degrees.—This is an impediment to marriage created by consanguinity and affinity, and was formerly a canonical bar, rendering the marriage only voidable and annullable by sentence of nullity passed during the lifetime of the parties; but since Lord Lyndhurst's Act (5 & 6 Wm. IV. c. 54), it has been constituted in its effect a civil impediment rendering the marriage void. This statute, after reciting that marriages between persons within the prohibited degrees of consanguinity or affinity should be *ipso facto* void, and not merely voidable, proceeds to enact that "all marriages

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(*z*) See *Gore* v. *Gibson*, 13 M. & W. 623.
(*a*) *Le Geyt* v. *O'Brien*, Milw. Ir. Eccl. Rep. 325; *Parker* v. *Parker*, 2 Lee, 382.
(*b*) *Le Geyt* v. *O'Brien* (*ubi sup.*).
(*c*) Fraser, H. & W. 72; Bish. Law of Mar. and Div. s. 131.
(*d*) *Harrod* v. *Harrod*, 1 Kay. & J. 4; 18 Jur. 85.

which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever (*e*).

Consanguinity.—Consanguinity is the relationship of parties who are descended from the same ancestor, and is either in the direct or collateral line. In the direct line of ancestors and descendants marriage is absolutely unlawful, however remote the relationship may be. And in the collateral line all beyond the first degree of the canon law computation, or the third of the civil law, may contract valid marriages.

Affinity.—Affinity is the relationship which arises from marriage, and exists between one spouse and the relations of the other spouse, and is an impediment to the same extent as consanguinity (*f*); but the kindred of the one may marry the kindred of the other (*g*); and one of the spouses may marry the *affinis* of the other spouse, for *affinis mei affinis non est mihi affinis*. Affinity by the law of England must be created by marriage, and carnal intercourse is not sufficient (*h*).

By the operation of the unrepealed portion of 32 Hen. VIII. c. 38 (the Statute of Pre-contracts), which incorporated the prohibited degrees set out in 28 Hen. VIII. c. 7, and of the 99th canon, the table of prohibited degrees compiled by Archbishop Parker in 1563, and inserted in the Common Prayer Book (the Levitical degrees) (*i*), is a portion of the statute law of the realm, and are binding both on the clergy and laity (*k*). The table of affinity is set out in the Statutory Rules and Orders, 1909, issued under the authority of the Marriage Act, 1898.

A marriage with a deceased husband's brother, valid by the law where it was celebrated, and where the parties were domiciled, was valid in England; although the wife was domiciled in England at the time of the final marriage, and merely acquired a foreign domicil by reason of that marriage (*l*).

By the Colonial Marriages (Deceased Wife's Sister) Act,

(*e*) Sect. 2. This Act draws a distinction between affinity and consanguinity by declaring that marriages celebrated before its passing (August 31, 1835) by persons within the prohibited degrees of affinity shall not be annulled unless decree pronounced in a suit depending at the time of the passing of the Act (sect. 1). This Act does not extend to Scotland (sect. 3).

(*f*) *Butler* v. *Gastrill*, Gibb. Ch. 156.

(*g*) Shelf. Mar. and Div. 174. *Oxenham* v. *Gayre*, Bac. Abr. Mar. & Div. A.

(*h*) *Wing* v. *Taylor* (f. c. *Wing*), 30 L. J. P. M. & A. 258; *Pagani* v. *Pagani*, L. R. P. & D. 223; 35 L. J. P. & M. 87.

(*i*) Leviticus, chap. viii.

(*k*) *Sherwood* v. *Ray*, 1 Moo. P. C. 353.

(*l*) *Brook* v. *Brook*, 9 H. L. Cas. 193; *Phillips, In re; Charter* v. *Ferguson*, [1919] 1 Ch. 128; 88 L. J. Ch. 27 (daughter of illegitimate brother of deceased wife).

1906 (*m*), it was declared that where a man had, whether before or after the passing of the Act, married his deceased wife's sister, the parties being domiciled in a part of the British Possessions in which at that date such a marriage was legal, the marriage if legal in other respects was to be deemed always to have been legal.

Before August 28, 1907, a marriage with a deceased wife's sister or half-sister in this country was void as being within the prohibited degrees of affinity, but by the Deceased Wife's Sister's Marriage Act, 1907 (*n*), s. 1, "No marriage heretofore or hereafter contracted between a man and his deceased wife's sister, within the realm or without, shall be deemed to have been or shall be void or voidable as a civil contract, by reason only of such affinity."

A sister of the half-blood is included under the word "sister." It was provided by the Act that if any minister of the Church of England refused to perform the service he was bound to permit any other clergyman entitled to officiate within the diocese to perform the service. Clergymen were not relieved from any ecclesiastical censure where they themselves contracted such a marriage.

The Act provided that where any such marriage had been annulled, or where either party after the marriage and during the life of the other had lawfully married another person, such marriage should be deemed to have "become and to be void upon and after the day upon which it was so annulled, or upon which either party thereto lawfully married another as aforesaid." The Act contains savings of rights in respect of any dignity, title of honour or property, and no will shall be deemed to have been revoked by reason of any marriage heretofore contracted being made valid. The devolution or distribution of the estate of any intestate not a party to the marriage and being a lunatic so found was not to be effected.

The law as to marriage with a divorced wife's sister or half-sister, or with a brother's or half-brother's divorced wife, remained unaffected, and divorce gives no validity to such a marriage during the lifetime of the divorced wife (*o*).

By the Deceased Brother's Widow's Marriage Act, 1921 (*oo*), the Deceased Wife's Sister's Marriage Act was amended so as to include a marriage between a man and his deceased brother's

(*m*) 6 Edw. VII. c. 30.
(*n*) 7 Edw. VII. c. 47.
(*o*) S. C. J. Consolidation Act, 1925, s. 184 (1).
(*oo*) 11 & 12 Geo. V. c. 24.

widow, and as so amended is to take effect as though it had been passed in 1921.

The Deceased Wife's Sister's Marriage Act, and the amending Act, do not affect any other affinities than those specifically mentioned, that is, the sister or half-sister of a wife, the brother or half-brother of a husband. Therefore the marriage of a man with a daughter of the half-sister of his dead wife is null and void. A widower married the niece of his dead wife, and afterwards married another woman He was found guilty of bigamy, although the second marriage was declared void (*p*). The Court will pronounce a decree of nullity in a case where both parties were at the time of the ceremony aware of this impediment (*q*).

Illegitimacy does not prevent the operation of the law against marriages within the prohibited degrees both as regards consanguinity and affinity; for although, legally speaking, a bastard is *filius nullius* and has no relations, yet decency and morality hinder the legal theory from being logically carried out. Thus a marriage with the niece of a dead wife was set aside, the mother of the niece being an illegitimate sister of the dead wife (*r*).

(4) Previous Marriage.—Another and important impediment to a valid marriage is a pre-existing valid marriage on the part of both or either of the spouses; that is, where the husband or wife of a prior legal marriage is living at the date of the ceremony of the second marriage. This second marriage is bigamous or polygamous (*s*), and the contracting it is treated as a felony, and severely punishable by the criminal law.

A second marriage while the first is undissolved is null and void without any sentence, although under such circumstances as would not render the bigamist criminally liable. The children of the second marriage are in England illegitimate, though both parties, or at any rate one of them, may have contracted the union in perfect good faith and in ignorance of the

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(*p*) *Reg.* v. *Allen*, L. R. 1 C. C. R. 367; 41 L. J. M. C. 97.

(*q*) *Andrews* (f. c. *Ross*) v. *Ross*, 14 P. D. 15; 58 L. J. P. 14. In this case *Miles* v. *Chilton* (1 Rob. 684) was followed, which was a decision of an ecclesiastical court; but in the earlier case the respondent opposed the suit on the ground of the misconduct and fraud of the petitioner; and the court had to dispose of the suit that was before it.

(*r*) *Reg.* v. *Brighton*, 1 B. & S. 447; 30 L. J. M. C. 197. And see *Phillips, In re; Charter* v. *Ferguson*, [1919] 1 Ch. 128.

(*s*) What is defined in modern English law as "bigamy" was known to the canon law as "polygamy," for a "bigamist" was one who married a second time whether the consort of the previous marriage was alive or not, *e.g.*, marrying two unmarried women in succession, or once marrying a widow.

impediment to their marriage (*t*). This kind of marriage is called by the canon law *matrimonium putativum*, and is recognized by the Scotch law, which follows the canon, so far as to render the children of such union legitimate, though the marriage itself be null. This also seems to be the law in several of the United States (*u*).

When suits for nullity are instituted on this ground, strict proof is required of the identity of the parties (*x*); but lapse of time is no bar to the bringing of the suit (*y*). Misconduct also, however gross, of a party proceeding to annul a marriage by reason of bigamy is no bar to a sentence of nullity; accordingly an allegation by a woman pleading misconduct and fraud on the part of the second husband, including his cognizance of the first marriage at the time of the second, and of the first husband being then alive, was rejected as insufficient to bar the sentence of nullity (*z*). As a conviction for bigamy is not a judgment *in rem*, it would seem that a respondent in a suit for nullity based on bigamy is at liberty, notwithstanding the conviction, to prove the invalidity of the first marriage (*a*).

This offence was originally cognizable only in the ecclesiastical courts, but was made a capital offence by 1 Jac. I. c. 11. The statute that now regulates the offence is 24 & 25 Vict. c. 100, s. 57:—

"Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland, or elsewhere (*b*), shall be guilty of felony; and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding seven years, and any such offence may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland where the offender shall be apprehended, or be in custody, in the same manner, in all respects as if the offence had been actually committed in that county or place; Provided that: [1] Nothing in this section contained shall extend to any second marriage contracted elsewhere than in England or Ireland by any other than a subject of Her Majesty; [2] or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not

(*t*) *Re Wilson's Trusts*, L. R. 1 Eq. 247.

(*u*) Fraser, H. & W. 137, and Parent and Child, 22; Bish. Laws of Mar. & Div. s. 301.

(*x*) *Searle* v. *Price* (f. c. *Searle*), 2 Hag. Con. Rep. 187.

(*y*) *Johnston* v. *Parker* (f. c. *Johnston*), 3 Phill. 39; *Duins* v. *Duins* (*otherwise Donovan*), 3 Hagg. Eccl. Rep. 301. For sufficiency of evidence, see *Bayard* (f. c. *Morphew*) v. *Morphew*, 2 Phill. 321.

(*z*) *Miles* v. *Chilton*, 1 Rob. 684.

(*a*) See *Searle* v. *Price* (f. c. *Searle*), 2 Hag. Con. Rep. 187; *Bayard* (f. c. *Morphew*) v. *Morphew*, *ubi sup.*

(*b*) "Elsewhere" is not to be limited to within the dominions of the Crown; *Rex* v. *Russell* (*Earl*), [1901] A. C. 446.

have been known by such person to be living within that time; [3] or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage; or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction."

The first exception limits the liability for bigamy committed elsewhere than in England or Ireland to subjects of the British Crown; thus a French subject marrying in England, then going back to France and contracting a second marriage, subsisting the first, would not be liable to the pains and penalties of this section.

The second exception does not throw upon the prisoner the burden of proving that it was not known to him or her that the former wife or husband was living at the time of the celebration of the second marriage. The usual presumption is that a person not proved to be dead within a reasonable time is still alive (*c*); but the presumption in favour of innocence is still greater (*d*). Where, however, there is no evidence of separation, the accused is bound to displace the presumption that he or she was aware of the existence of the other spouse at the time of the second marriage (*e*).

It is not now deemed necessary to wait for the seven years' absence to be complete, if the accused marries a second time within that period under a *bona fide* and reasonable belief that the other spouse is dead (*f*). While there is no strict irrebuttable presumption in favour of the existence of human life, without reference to accompanying circumstances, as the age or health of the party (*g*), yet where there are conflicting presumptions, the presumption in favour of life will have most weight; and in all cases it is a question of fact for the jury (*h*). The absence for the statutory period, or ignorance of the existence of the other spouse, does not render the second marriage valid.

(*c*) *Reg.* v. *Curgerwen*, L. R. 1 C. C. R. 1; 35 L. J. M. C. 58.
(*d*) *Rex* v. *Twyning*, 2 B. & Ald. 386.
(*e*) *Reg.* v. *Jones*, 11 Q. B. D. 118; 52 L. J. M. C. 96.
(*f*) *Reg.* v. *Tolson*, 23 Q. B. D. 168. In this case the majority of the Court for Crown Cases Reserved (nine to five) decided that, where a prisoner was convicted of bigamy, having gone through the ceremony of marriage *within* seven years of being deserted by her husband, and the jury found that she went through the second marriage in good faith and on reasonable grounds for believing her husband to be dead, her conviction ought to be quashed, as a *bona fide* belief on reasonable grounds in the death of her husband at the time of the second marriage was a good defence. The judgment of Cave, J., was approved by the Judicial Committee in *Bank of N.S.W.* v. *Piper*, [1897] A. C. 390.
(*g*) Shelf. Mar. & Div. 226; *Reg.* v. *Lumley*, L. R. 1 C. C. R. 196.
(*h*) *Reg.* v. *Willshire*, 6 Q. B. D. 366; 50 L. J. M. C. 57.

The third exception does not include a judicial separation or a decree *nisi* for divorce. The *ligamen* or *vinculum matrimonii* still exists until it is legally and fully dissolved by the *decree absolute* of the court of divorce (*i*), and parties run a risk of being indicted for bigamy if they contract a fresh marriage before such decree absolute. The Court will relieve where, through inadvertence and mistake, the decree *nisi* has not been made absolute and the parties have since married, by making the decree absolute notwithstanding the marriage, if the King's Proctor does not oppose (*k*).

In an indictment for bigamy the first marriage must be strictly proved, and mere reputation and cohabitation will not suffice (*l*); and it is doubtful whether the unsupported admission of the defendant is enough (*m*). With reference to the second marriage, it is sufficient if the parties go through the forms and ceremonies legal and necessary in the place of celebration (*n*), though the marriage itself, from the circumstances attending it, is void, as not being recognized by the law (*o*); but the form of ceremony must be recognized by the law of the place where it is solemnized (*p*).

The sentence of divorce *a vinculo matrimonii* of an English marriage pronounced by a foreign Court must be on grounds sufficient to dissolve it in England, otherwise it will be no defence to an indictment for bigamy (*q*). The sentence of a court of competent jurisdiction formerly was not, but is now, a conclusive defence against an indictment for bigamy (*r*); but a conviction for bigamy does not prevent a person setting up the invalidity of his first marriage in a suit by his wife for nullity of the second marriage (*s*). The question of foreign divorces is more fully treated in chap. xvi. on "The International Validity of Marriage and Divorce."

(*i*) *Stanhope* v. *Stanhope*, 11 P. D. 103; 55 L. J. P. 36.

(*k*) *Wickham* v. *Wickham*, 6 P. D. 11.

(*l*) See *Morris* v. *Miller*, 4 Burr. 2057; *Birt* v. *Barlow*, 1 Doug. 171. These cases were actions of crim. con.

(*m*) *Reg.* v. *Flaherty*, 2 C. & K. 782; *R.* v. *Lindsay*, [1902] 66 J. P. 505; but see *Rex* v. *Truman*, 1 East, P. C. 470, and *Reg.* v. *Upton*, cited 3 Russ. Cr. 315.

(*n*) *Reg.* v. *Allen*, L. R. 1 C. C. R. 367; 41 L. J. M. C. 97; disapproving of *Reg.* v. *Fanning*, 17 Ir. C. L. 289.

(*o*) *Reg.* v. *Brawn*, 1 C. & K. 144.

(*p*) *Burt* v. *Burt*, 29 L. J. P. M. & A. 133.

(*q*) *Reg.* v. *Lolley*, 2 Cl. & F. 567. For an explanation of this case see *Harvey (otherwise Farnie)* v. *Farnie*, 8 App. Cas. 43; and see *post*, chap. xvi., "The International Validity of Marriage and Divorce."

(*r*) *The Duchess of Kingston's Case*, 1 Leach, 146.

(*s*) *Bruce* v. *Burke*, 2 Add. 471, 480.

The Royal Marriage Act.—There is another kind of impediment to a valid marriage affecting only a particular class in the realm, namely, the Royal Marriage Act (*t*), which relates to descendants of King George II.

No descendant of the body of King George II., male or female (other than issue of princesses who have married or may hereafter marry into foreign families), shall be capable of contracting matrimony without the previous consent of the reigning Sovereign, signified under the great seal and declared in Council; and every marriage or matrimonial contract of any such descendant without such consent first had and obtained shall be null and void to all intents and purposes whatsoever (*u*).

In case any such descendant of the body of King George II., being above the age of twenty-five years, shall persist in his or her resolution to contract a marriage disapproved of or dissented from by the reigning Sovereign, then such descendant may at the expiration of twelve calendar months after notice given to the Privy Council, contract such marriage; and such marriage shall be good unless both Houses of Parliament, before the expiration of the said twelve months, expressly declare their disapprobation of such intended marriage (*x*).

The judges consulted by the House of Lords in the *Sussex Peerage Case* (*y*) unanimously decided that the operation of this statute was not limited to marriages celebrated within the kingdom of Great Britain and Ireland, but extended to marriages entered into by the descendants of George II. in foreign countries. The incapacity attaches itself to the person of the individual affected by it, and he carries it with him wherever he goes (*z*). The object of the Act would be frustrated, and the mischief intended to be remedied would remain unremedied, and the power of the Sovereign nugatory, if a marriage which in England would be void should be held good and valid when celebrated out of the country.

(*t*) 12 Geo. III. c. 11.
(*u*) Sect. 1.
(*x*) Sect. 2.
(*y*) 11 Cl. & F. 85.
(*z*) 11 Cl. & F. 144.

CHAPTER IV.

THE ESSENTIAL REQUIREMENTS OF A VALID MARRIAGE.

The clear policy of the law requires that marriage shall, as far as possible, be safeguarded from fraud and mistake, and be not lightly entered upon; therefore every marriage is to be prefaced by certain necessary acts, without which it is either absolutely null and void or liable to be called in question, and the parties to it severely punished for their tortious or irregular conduct. The *lex loci celebrationis* determines what necessary acts should preface the inception of the tie; the *lex domicilii* determines the capacity of the parties to contract marriage (*a*). The validity of the marriage of any natural born and domiciled English subject may be tested in the Probate Division in a petition by such person for a decree that the marriage is valid under the Legitimacy Declaration Act, 1858 (*b*).

The necessary preliminaries will be set forth in this chapter in three sections:—

Section 1. The consent of proper parties.

,, 2. The requirements of marriage in England: (a) Of those belonging to the Established Church; (b) Of Nonconformists.

,, 3. The requirements of marriage celebrated by British subjects abroad.

Section 1.

The Consent of Proper Parties.

Infants.—The nature of marriage renders it absolutely necessary that the contracting parties should consent to form a binding union; and if the ceremony be gone through between infants or minors who have not reached the age of consent (twelve in girls and fourteen in boys), the result is an inchoate

(*a*) See *Re Bethell*, *Bethell* v. *Hildyard*, 38 Ch. D. 220; 57 L. J. Ch. 487, and *post*, chap. xvi., "The International Validity of Marriage and Divorce."

(*b*) 21 & 22 Vict. c. 93. See *Scott* v. *Att.-Gen.*, 11 P. D. 128; *Brinkley* v. *Att.-Gen.*, 15 P. D. 76; 59 L. J. P. 51.

and imperfect marriage, which is voidable at the election of the parties on attaining the age of consent (*c*). Not only is the consent of the contracting parties requisite, but where the parties are minors, the approbation of those in whose power they are is required. By common law the marriage of infants who have reached the age of consent is valid *per se*, and does not require the consent of parents and guardians; but since Lord Hardwicke's Act such consent is requisite by statute.

The statute now regulating the matter of consent to the marriage of minors is the Guardianship of Infants Act, 1925 (*d*), which contains a curious illustration of legislation by reference, and repeal by inference. This Act provides that the persons whose consent is requisite shall be those persons who are entitled to dissent under the Act of 1823 (*e*). The effect of this is presumably to repeal section 16 of that Act, which sets out the persons whose consents were required, and on referring to section 8 of the Act we find that the persons entitled to dissent, who are now the persons to consent, are the parents or guardians of the minors.

If the father of the minor be *non compos mentis*, or if the guardian or mother be *non compos mentis* or beyond seas, or such persons shall unreasonably or from undue motives refuse or withhold their consent, the persons desirous of marrying may apply by petition to the Lord Chancellor, &c., who, on finding the marriage to be a proper one, may declare it to be so; and such declaration shall operate as validating the marriage (*f*).

The consent of the proper person has been held to be directory only, and its want does not render the marriage celebrated without it invalid (*g*). A formal written consent is not requisite (*h*), nor a personal knowledge of the party intending to marry the minor (*i*). It is enough if the consent be given at the ceremony, which fact may be proved by the presence of the father, who does not express his dissent (*k*). Though consent in the case of a marriage by licence (*l*), and after publication of banns, is presumed, the presumption does not hold

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(*c*) See *ante*, p. 34. (*d*) 15 & 16 Geo. V. c. 45.
(*e*) 4 Geo. IV. c. 76, s. 16.
(*f*) *Ibid.*, s. 17. It will be noticed that in the case of the father the Chancery guardian is substituted only where he is *non compos mentis;* whereas if the mother or other guardians are under disabilities, then a Chancery substitute may be petitioned for.
(*g*) *Rex* v. *Inhabitants of Birmingham*, 8 B. & C. 29; 15 L. J. M. C. 65.
(*h*) *Hodgkinson* v. *Wilkie*, 1 Hag. Con. Rep. 262, 267.
(*i*) *Cresswell* v. *Cosins*, 2 Phill. 281.
(*k*) *Cope* v. *Burt*, 1 Hag. Con. Rep. 434.
(*l*) *Smith* v. *Huson*, 1 Phill. 287, 296.

good where the father remained totally ignorant of the marriage for some time after its celebration (*m*). Where dissent is openly expressed by the proper parties to a marriage intended to be celebrated after publication of banns, such publication becomes null and void (*n*). Where, however, there is no dissent, the publication, even without consent, operates to render the marriage valid, and after solemnization it cannot be set aside (*o*).

Wards of Court.—Marrying, or attempting to marry (*p*), or abetting the marriage of, wards of Chancery, without first obtaining the consent of the Court, is a contempt of Court and punishable (*q*). The jurisdiction of the Court is not affected by the parents of the infant being alive, or by a testamentary guardian having been appointed. Ignorance of the infant being a ward of Court does not free the marrying party from the consequences of his act (*r*). The Court will restrain its wards from contracting marriages which are likely to prove injurious to them, although they have attained the age of consent, and might contract a valid marriage. It will, therefore, made orders preventing the access of an ineligible or improper person by letter or other means (*s*). The Court in flagrant cases will not content itself with merely committing the party in contempt, but will direct a criminal prosecution (*t*).

Bastard Minors.—Illegitimate minors formerly could have no lawfully appointed guardians except those given to them by the Court of Chancery; and their parents (not being lawful parents) had no power either to consent or to object to their marriage (*u*); but now, under the Guardianship of Infants Act, 1925, the person whose consent is required to the marriage of an illegitimate minor is the mother, or, if she has been deprived of the custody, the person to whom the custody has been committed, or, if the mother is dead, the guardian appointed by the mother.

Forfeiture of Property accruing from a Marriage obtained by Fraud.—Between the passing of Lord Hardwicke's Act in 1753 and 1823, the want of consent of the proper parties avoided the marriages of minors which were obtained in fraud of such

(*m*) *Balfour* v. *Carpenter*, 1 Phill. 221. (*n*) 4 Geo. IV. c. 76, s. 8.
(*o*) *Diddear* v. *Faucit*, 3 Phill. 580. (*p*) *Warter* v. *Yorke*, 19 Ves. 451.
(*q*) *Butler* v. *Freeman*, Ambl. 301; *Wellesley* v. *Duke of Beaufort*, 2 Russ. 1; *Phipps* v. *Earl of Anglesea*, 1 P. Wms. 696.
(*r*) *Herbert's Case*, 3 P. Wms. 116; *Nicholson* v. *Squire*, 16 Ves. 259. See *post*, Part IV. chap. v.
(*s*) *Wellesley* v. *Duke of Beaufort* (*ubi sup.*); *Smith* v. *Smith*, 3 Atk. 305.
(*t*) *Priestley* v. *Lamb*, 6 Ves. 421.
(*u*) *Horner* v. *Horner*, 1 Hag. Con. Rep. 337; *Priestley* v. *Hughes*, 11 East, 1.

parties. But in the latter year the Act of 4 Geo. IV. c. 76, s. 23, provided that where marriages (celebrated according to the rites of the Church of England (*x*)) of minors, who are neither widowers nor widows, by licence or after publication of banns are procured by false oath or fraud, the Attorney- or Solicitor-General may sue for a forfeiture of all estate, right, title, and interest in any property accruing to the party so offending by force of such marriage by information at the relation of a parent or guardian of a minor whose consent has not been given to the marriage (*y*). The written authority of the relator should be filed with the information (*z*). The Court has no discretion to mitigate the penalty, but is bound to declare a forfeiture in the words of the Act (*a*). The Court may then order that all such estate and interest shall be secured for the benefit of the innocent party, or of the issue of the marriage, or of any of them, in such manner as the Court shall think fit. If both parties are guilty, then the property may be settled by the Court for the benefit of the issue of the then or any future marriage. Any previous agreements made in contemplation of such marriage are void (*b*). The proper mode of settling the property of the minor (if a female) by the Court has been held to be that, if there be no children, the wife should have the power of appointing the whole during the coverture by will, and if she survive her husband, either by deed or will; if there be children, and the wife die first, then the whole to go to the children—if sons, at twenty-one, and if daughters, at twenty-one or marriage; but if she survive her husband, then two-thirds go to the children of the marriage and one-third to be subject to her appointment by deed or will (*c*). This latter provision enables her to provide for a second marriage. Where the fund is small, the Court will order it not to be settled, but paid into Court; and will declare the trusts of it both in possession and in reversion (*d*). The Court will not now make an order for a settlement unless the Attorney-General appears separately from the relator (*e*).

(*x*) The provisions of this section are extended by 6 & 7 Wm. IV. c. 85, s. 43, and 19 & 20 Vict. c. 119, s. 19, to marriages not celebrated according to the rites of the Church.

(*y*) Sect. 25. The complaint of the parent or guardian must be on oath, and made within three months from the time of the marriage becoming known to the relator; and the information must be filed within a year after the solemnization of the marriage.

(*z*) *Att.-Gen.* v. *Willshire* (1875), W. N. 182.

(*a*) *Att.-Gen.* v. *Mulley*, 4 Russ. 329.

(*b*) 4 Geo. IV. c. 76, sect. 24.

(*c*) *Att.-Gen.* v. *Lucas*, 2 Ph. 753; 18 L. J. Ch. 100; followed in *Att.-Gen.* v. *Read*, L. R. 12 Eq. 38.

(*d*) *Att.-Gen.* v. *Clements*, L. R. 12 Eq. 32; 40 L. J. Ch. 678.

(*e*) *Att.-Gen.* v. *Read* (*ubi sup.*).

SECTION 2.

The Requirements of Marriage in England.

When persons intending marriage have obtained the consent (if necessary) of the proper parties to their union, they must celebrate or solemnize their marriage in a lawful and recognized manner, after satisfying the preliminary formalities imposed upon them by law.

(1) Church of England Marriages.—Where a marriage is celebrated according to the rites of the Established Church, the preliminary requirements are either (a) publication of banns; (b) or special licence; (c) or common or Ordinary's licence; (d) or superintendent-registrar's certificate in lieu of publication of banns; (e) and the presence of a duly ordained minister at the ceremony.

(a) Publication of Banns.—The publication of banns was first rendered compulsory in England by Lord Hardwicke's Act in 1753 (following the course taken by the Council of Trent) for all persons marrying who were not Quakers or Jews or had not obtained a special or Ordinary's licence.

The signification of the word is a "proclamation," and its ostensible use is a notification to people generally that the parties intend to contract a marriage; if, therefore, the publication is such as not to designate, but to conceal, the parties, it is no publication (*f*). It is intended to awaken the vigilance of parents and guardians, and to give them an opportunity of protecting their rights. The law, therefore, requires that the true name should be given (*g*). Formerly the publication of false names formed an *impedimentum dirimens* invalidating the marriage *in toto* (*h*); but since the Marriage Act of 4 Geo. IV. c. 76, nullity is confined to cases where the parties "knowingly and wilfully intermarry without due publication of banns" (*i*); and that which under the earlier law would have been no publication at all has been held under the later not to be such an undue publication as prevented a valid marriage from being contracted.

(*f*) *Fellowes* v. *Stewart*, 2 Phill. 238.
(*g*) *Wakefield* v. *Wakefield*, 1 Hag. Con. Rep. 394.
(*h*) *Sullivan* v. *Sullivan*, 2 Hag. Con. Rep. 238; *Pouget* v. *Tomkins*, 2 Hag. Con. Rep. 142.
(*i*) Sect. 22.

Both parties must be shown to be aware of the undue publication before the celebration of the marriage (*k*); for the wrongful act of the one will not be allowed to operate to the prejudice of the other, unless a participator (*l*); and where only one is guilty of fraud, the innocent party will not be allowed to have the marriage declared null and void (*m*).

The Act of 1823 requires the true Christian and surnames of the parties to be published, and where the parties had knowingly and wilfully intermarried after publication of banns in a false name, a decree of dissolution obtained by the husband on the ground of bigamous adultery was discharged on the ground that the marriage sought to be dissolved was void under sect. 22 (*n*). It is possible, however, that a person may have assumed another name so as to bring it within the description required by the statute. A person may take any surname, and even Christian name (*o*), he likes, and the law will recognize it, and neither royal licence nor Act of Parliament is necessary to sanction the change (*p*); and where the name has not been assumed for any fraudulent purpose, or for the occasion of the publication, banns may lawfully be published in that assumed name (*q*). A name, too, may be acquired by repute, and where the name so acquired is better known than the true name of the party, that is the proper name in which publication should be made; for it may be that an act of concealment would, under certain circumstances, be the result of using the true name (*r*); but the name must be so acquired by repute as to obliterate the true name. (*s*). The Courts will look with greater suspicion on an assumed name in which a minor is married than on one in which an adult is married, because the rights of the parties interested in the minor might be directly affected by the assumption of such new name, whereas in the other case, if no fraud is practised on the other contracting party, the interests of third persons are not equally

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(*k*) *Rex* v. *Wroxton*, 4 B. & Ad. 640; 2 L. J. M. C. 64; *Wright* v. *Elwood*, 1 Curt. 662; *Brealy* v. *Reed*, 2 Curt. 833; *Midgeley* v. *Wood*, 30 L. J. P. M. & A. 57; *Gompertz* v. *Kensit*, L. R. 13 Eq. 369; 41 L. J. Ch. 382.

(*l*) *Wiltshire* v. *Prince*, 2 Hag. Eccl. Rep. 332; *Hadley* v. *Reynolds*, cited in *Tongue* v. *Allen*, 1 Curt. 39, 47; 1 Moo. P. C. 90 (on appeal).

(*m*) *Templeton* v. *Tyree*, L. R. 2 P. & D. 420; 41 L. J. P. & M. 86.

(*n*) *Small* v. *Small and Furber*, 67 So. J. 277.

(*o*) *Wyatt* v. *Henry*, 2 Hag. Con. Rep. 215.

(*p*) *Frankland* v. *Nicholson*, 3 M. & S. 259 *n.*

(*q*) *Rex* v. *Billinghurst*, 3 M. & S. 250.

(*r*) *Rex* v. *St. Faith's, Newton*, 2 D. & R. 34.

(*s*) *Fendall* v. *Goldsmith*, 2 P. D. 263; 46 L. J. P. 70, where a divorced wife remarried her divorced husband, and it was held that the banns were rightly published in her marriage name, though on divorce she had reverted to the use of her maiden name.

affected (*t*). Illegitimate children have no name except that which they acquire by repute, though usually they take that of their mother. Where there is a name of baptism and a native surname, those are the true names, unless they have been overridden by other names assumed and generally accredited (*u*); and the names by which persons are usually known should be used in the publication of banns (*x*).

The variation in the names may be either *total* or *partial*. If there be a total variation of a name or names—*i.e.*, if the banns are published in a name or names totally different from those which the parties, or one of them, ever used, or by which they were ever known—the marriage in pursuance of that publication is invalid if both parties are cognizant of the undue publication (*y*); and it is immaterial in such cases whether the misdescription has arisen from accident or design, or whether such design be fraudulent or not (*z*). The above is part of Lord Tenterden's judgment, which was under the old law; it is now submitted, however, that the law is not absolutely clear on the point whether or not, if two parties, both of full age, without the intention of committing fraud, choose to get married after publication of banns in names which are not their true names, their marriage will be held null and void (*a*). After long cohabitation and birth of children, the Court would be more likely to presume in favour of than against the validity of such marriage. Where two minors marry after publication of banns in names which are not true but with consent of parents or guardians, it may be asked whether such marriage should be held valid (*b*). Where the variation is partial, it is always open to explain the supposed misdescription, and then the presence or absence of fraudulent intent and motives of the parties become of marked importance (*c*). Such variations may arise, not only from fraud, but from negligence, accident, error, from unsettled orthography, or other causes consistent with

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(*t*) *Mayhew* v. *Mayhew*, 2 Phill. 11.

(*u*) *Wakefield* v. *Wakefield*, 1 Hag. Con. Rep. 394.

(*x*) *Sullivan* v. *Sullivan*, 2 Hag. Con. Rep. 238; *Wilson* v. *Brockley*, 1 Phill. 132, 147.

(*y*) *Brealy* v. *Reed*, 2 Curt. 833; *Meddowcroft* v. *Gregory*, 2 Phill. 365.

(*z*) *Rex* v. *Tibshelf*, 1 B. & Ad. 190; 8 L. J. (o.s.) M. C. 120.

(*a*) 4 Geo. IV. c. 76, s. 22, and see *Holmes* v. *Simmons*, L. R. 1 P. & D. 523; 37 L. J. P. & M. 58; but see *Midgeley* v. *Wood*, 30 L. J. P. M. & A. 57.

(*b*) Per Lord Penzance in *Holmes* v. *Simmons* (*ubi sup.*). The tendency of the Courts would be to uphold it, as the element of fraud and the evasion of the rights of those whose consent is requisite would be absent.

(*c*) *Pouget* v. *Tomkins*, 2 Hag. Con. Rep. 142; 3 M. & S. 262 *n.*

honesty of purpose. Explanatory evidence will be received; but if unsatisfactory, the Court will presume against the *bona fides* of the transaction (*d*), as where part of a name is omitted (*e*), or an additional name is inserted (*f*). A marriage celebrated by banns, but without due publication, comes within section 22 of 4 Geo. IV. c. 76, and is treated as one celebrated without any publication, and so null and void (*g*).

Mode of Publication.—All banns of matrimony are to be published in an audible manner in the church of the parish in which the persons to be married dwell (*h*), according to the form of words prescribed by the rubric prefixed to the Office of Matrimony in the Book of Common Prayer, upon three Sundays preceding the solemnization of marriage, during the time of morning service, or of evening service (if there be no morning service), immediately after the second Lesson (*i*). If the persons to be married dwell in different parishes, the banns are to be published in the church belonging to the parish in which each of the said persons dwell. In all cases where banns have been published the marriage must be solemnized in one of the parish churches where the banns have been published, and in no other place (*k*). After the solemnization of any marriage under a publication of banns, it shall not be necessary in support of such marriage to give any proof of the actual dwelling of the parties in the respective parishes wherein the banns were published, nor shall any evidence be received to

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(*d*) See the cases where partial variation occurred, *Dobbyn* v. *Corneck*, 2 Phill. 102; —— v. *Longley*, 1 Phill. 148 n.; *Meddowcroft* v. *Gregory*, 2 Phill. 365.

(*e*) *Stanhope* v. *Baldwin*, 1 Add. 93; *Tongue* v. *Allen*, 1 Moo. P. C. 90.

(*f*) *Green* v. *Dalton*, 1 Add. 289.

(*g*) *Wright* v. *Elwood*, 1 Curt. 662, where a widow was described as a spinster and with an assumed Christian name.

(*h*) See also 1 Vict. c. 22, s. 33, and 3 & 4 Vict. c. 72, s. 2. The bishop may, with the consent of the patron and incumbent, authorize the publication of banns in any public chapel of the parish, or of any chapel situated in an extra-parochial place, 4 Geo. IV. c. 76, s. 3; and may license chapels in populous places for the solemnization of matrimony, 6 & 7 Wm. IV. c. 85, s. 26.

(*i*) Some considerable doubt has arisen as to what is the proper place for publishing banns, whether after the second Lesson, or immediately before the sentences for the offertory, as the rubric has it; the former time is the one most generally used, and, being statutory, is the more safe.

(*k*) 4 Geo. IV. c. 76, s. 2. Where the parties live in different parishes, the rubric imposes the duty on the incumbent of the one parish not to solemnize marriage between them without a certificate of the banns having been thrice asked from the incumbent of the other parish. But if the one incumbent marry without the certificate of the other incumbent, the marriage would be valid, though the clergyman himself might be libelled in his bishop's court for an ecclesiastical offence. If the one incumbent wrongfully withheld his certificate he also might be ecclesiastically censured, and the other incumbent might validly perform the marriage.

prove the contrary in any suit touching the validity of such marriage (*l*).

Naval Marriages Act, 1908.—"Where one of the parties to a marriage intended to be solemnized in England after the publication of banns is an officer, seaman, or marine, borne on the books of one of His Majesty's ships at sea, the banns may be published on three successive Sundays at morning service on board that ship by the chaplain, or, if there is no chaplain, by the captain or other officer commanding the ship, and where banns have been so published, the person who published them shall, unless the banns have been forbidden on any of the grounds on which banns may be forbidden, give a certificate of publication."

Where such marriage is intended to be solemnized otherwise than in accordance with the rites of the Church of England, such officer, seaman, or marine may give notice of his intention to the proper officer, together with the name and address of the other party to the marriage, with such other information as may be necessary to enable the proper officer to fill up a certificate under the Act, and shall at the same time make and sign the declaration required by the Marriage and Registration Act, 1856 (*m*). Thereupon the proper officer shall issue a certificate to such officer, seaman or marine. Such certificate shall be in a prescribed form, and shall have like force and effect as a certificate of publication of banns, or that of a superintendent registrar of marriages under the Marriage and Registration Act, 1856 (*n*).

Banns.—No clergyman shall be *obliged* to publish the banns of matrimony between any persons, unless they shall, seven days at least before the time required for the first publication of such banns respectively, deliver, or cause to be delivered, to such clergyman a notice in writing dated on the day on which the same shall be so delivered: (i) Of their true Christian names and surnames; (ii) of the house or houses of their respective abodes within their parish or chapelry; (iii) and of the time during which they have dwelt, inhabited, or lodged in such house or houses (*o*).

(*l*) Sect. 26. *Tree* v. *Quinn*, 2 Phill. 14; *Rex* v. *Hind*, R. & R. 253; *Bodman* v. *Bodman*, 108 L. T. 383, 29 T. L. R. 348.

(*m*) 19 & 20 Vict. c. 119.

(*n*) Naval Marriages Act, 1908 (8 Edw. VII. c. 26), s. 1; and see Naval Marriages Act, 1915 (5 Geo. V. c. 35), which provided further facilities during the late war for marriage in a place of worship other than that where the requirements had been fulfilled on the certificate of the commanding officer.

(*o*) 4 Geo. IV. c. 76, s. 7. This section shows most clearly that publication of banns, though intended to promote notoriety and prevent secrecy in the contracting of matrimonial relations, operates with the exactly contrary effect (Report of

No clergyman solemnizing marriage between persons, both or one of whom shall be under the age of twenty-one after banns published, shall be punishable by ecclesiastical censures for solemnizing such marriage without the consent of parents or guardians, unless he shall have notice of the dissent of the parents or guardians; and in case where such parents or guardians, or one of them, shall openly and publicly declare, or cause to be declared in the church or chapel where the banns shall be so published, at the time of such publication, his, her, or their dissent to such marriage, the publication shall be absolutely void (*p*).

If a marriage be not had within three months after the publication of banns, no minister shall proceed to solemnize the marriage until the banns have been republished, unless by licence (*q*); but the marriage will not be held to be invalid because the parties have married after the prescribed time, if they have not done so wilfully and knowingly (*r*).

Where one party to a marriage celebrated in England is resident in Scotland, and the banns of such party are proclaimed, according to Scotch law or custom, in the parish or place in which he or she is resident, such marriage in England shall not be rendered invalid only by reason of such publication being in accordance with the Scotch and not the English method (*s*).

Commission on Marriage Laws, p. vi., and Rev. S. C. Wilks' Memorial, Appendix, 16-28). The clergyman is not bound to call for any notice of particulars of name or residence of the parties to be married; all he can do is to refuse to marry unless he is furnished with such notice, and if the parties make false statements in the notice, no penalties are attached to their so doing. Indeed, if the clergyman does not insist upon having proof of a seven days' residence in his parish by one of the parties, a residence in the parish of one clear day before the notice of publication of the banns is sufficient, whereas before a licence can be granted by the Ordinary, one of the parties must depose on oath to a fifteen days' residence in the parish of the church or chapelry in which the marriage is to be celebrated (see *post*, Licence, p. 57). The clergyman should, however, take reasonable precautions that the publication of banns should be due and proper, and if he be aware of a false description of residence he ought not to proceed with the marriage, though, if it be already solemnized, it is not thereby invalidated (*Sullivan* v. *Sullivan*, 2 Hag. Con. Rep. 238). That a clergyman who marries persons non-resident in his parish, and does not use diligence in his inquiries about them, is liable to ecclesiastical censures (*Nicolson* v. *Squires*, 16 Ves. 259. See also *Priestley* v. *Lamb*, 6 Ves. 421; *Wynn* v. *Davies*, 1 Curt. 69; *Voysey* v. *Martin*, Stephen's Laws relating to the Clergy, 743). If a clergyman improperly refuse to perform the marriage service, he can be proceeded against in the ecclesiastical courts (*Argar* v. *Holdsworth*, 2 Lee, 515). Whether he can be proceeded against by action or indictment, see *Davis* v. *Black*, 6 Jur. 55, and *Reg.* v. *Moorhouse James*, 19 L. J. M. C. 179. It is very doubtful whether he can be proceeded against by action, especially since the passing of 6 & 7 Wm. IV. c. 85, which enables parties to be married elsewhere than in their parish churches. The case of *Reg.* v. *Moorhouse James* (*ubi sup.*) can be no longer law on its special facts since 19 & 20 Vict. c. 119, s. 11.

(*p*) Sect. 8. (*q*) Sect. 9.

(*r*) *Reg.* v. *Clarke* (1867), 10 Cox, C. C. 474; 16 L. T. 429.

(*s*) 49 & 50 Vict. c. 3, s. 1.

(b) Licence.—A licence is a dispensation which enables the parties who obtain it to be married without the publication of banns; it cannot be granted except by persons having episcopal authority. There are two kinds of licence for marriages according to the rights and ceremonies of the Church of England—the special licence of the Archbishop of Canterbury, and the Ordinary's, or common, licence granted by the proper officer authorized to issue them.

Special Licence.—When the supremacy of the See of Rome was successfully controverted by Henry VIII., the legatine jurisdiction of granting dispensations, faculties, and licences was reserved to the Archbishop of Canterbury by 25 Hen. VIII. c. 21, s. 4. This privilege was preserved to him by the Marriage Act, 4 Geo. IV. c. 76, s. 20, and by 6 & 7 Wm. IV. c. 85, s. 1. The special licence enables the parties who obtain it to dispense with the necessity of residing in any particular place before its grant, and to be married at any time or place within three months from the date of the issue. The cost of this licence, including the stamp (£5), is about £30 (*t*).

(c) Common, or the Ordinary's, Licence.—This licence is obtained from the vicars-general appointed by the Archbishops of Canterbury and York for their respective provinces, and from the chancellors and surrogates (*u*) appointed by the bishops for their respective dioceses, who derive this power of issuing licences both from the Common Law and 25 Hen. VIII. c. 21. The issuing of this licence is governed by 4 Geo. IV. c. 76, ss. 10-19.

Marriage on this licence must be celebrated in no other church or chapel than in the parish church, or in some public chapel of, or belonging to, the parish or chapelry within which the usual place of abode of one of the parties to be married shall have been for the space of fifteen days immediately before the granting of the licence (*x*).

A caveat may be entered against this licence, which is not to issue until such caveat has been withdrawn, or it has been decided by the proper person that it ought not to obstruct the grant of the licence (*y*).

(*t*) It is obtainable only at the Faculty Office, Knightrider Street, Doctors' Commons, E.C.4.

(*u*) These surrogates must take oaths of office, and give security in a bond of £100 to the bishop of the diocese for the due and faithful execution of their office, 4 Geo. IV. c. 76, s. 18.

(*x*) Sect. 10.

(*y*) Sect. 11.

The oath to be taken before the surrogate, &c., by one of the parties previous to the granting of the licence is to the following effect:—

(i) That there is no impediment of kindred or alliance, or of any other lawful cause, nor any suit commenced (in the Probate, Divorce, and Admiralty Division of the High Court of Justice) to bar or hinder the proceeding of the said matrimony according to the tenor of the licence. (ii) That one of the parties hath for the space of *fifteen* days immediately preceding the application for the licence had his or her usual place of abode within the parish or chapelry within which such marriage is to be solemnized. (iii) That where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, the consent of the person or persons whose consent to such marriage is required has been obtained thereto (*z*). If, however, there be no such person having authority to give consent, the licence may issue upon the deponent making an oath to that effect (*a*).

Unless a marriage on a licence of this kind take place within three months from the date of its issue, it is not to be solemnized until a new licence has been obtained unless by banns duly published (*b*). Section 22 of the same Act enacts that where persons wilfully intermarry without licence from a person or persons having authority to grant the same first had and obtained, or knowingly and wilfully consent to or acquiesce in the solemnization of marriage by any person not being in holy orders, such marriage shall be null and void (*c*).

Difference between Banns and Licences.—The difference of ideas as to notoriety associated with banns and licences has rendered necessary in the case of the latter much less strictness in the accuracy of the names of the parties; accordingly, a false Christian name or surname in a licence does not render the marriage celebrated on it void (*d*); so a mere misdescription, unless fraudulent, will not invalidate a marriage, for "in licences the identity is the material circumstance to which the court principally looks" (*e*). Thus, where a man was described in a

(*z*) 4 Geo. IV. c. 76, s. 14.
(*a*) *Ibid.*
(*b*) Sect. 19. (*c*) See *post*, p. 60.
(*d*) *Rex* v. *Burton-upon-Trent*, 3 M. & S. 537. A false statement on oath before a surrogate is not indictable as perjury (*Rex* v. *Forster*, R. & R. 459); but as made to procure a marriage (whether celebrated or not) amounts to a common law misdemeanour (*Reg.* v. *Chapman*, 18 L. J. M. C. 152).
(*e*) *Ewing* v. *Wheatley*, 2 Hag. Con. Rep. 175, 184; *Cope* v. *Burt*, 1 Hag. Con. Rep. 434; see also *Clowes* v. *Clowes*, 2 Not. of Cas. 1.

licence (not for purposes of fraud) as having two Christian names more than he really had, the marriage which took place on the licence was held valid (*f*); and a partial departure from the true name of one of the parties to a marriage in a licence obtained in the altered name by the other party, though for the purpose of concealing the intended marriage, has been held to be no cause of nullity, if the altered name may represent the person, and if the licence had been obtained for and by the direction of that person (*g*); but a like alteration of names in a publication of banns would be a ground for annulling the marriage (*h*).

As in banns, the guilty and fraudulent knowledge of both parties must be proved before a marriage celebrated on a licence obtained from a person not having authority to grant it will be rendered void (*i*). Where parties were married without a licence, the licence being applied for the day before and issued the day after the marriage, and the husband alone at the time of the ceremony was aware of its absence, the marriage was held to be valid (*k*).

(d) On the Registrar's Certificate.—Since the passing of 6 & 7 Wm. IV. c. 85 (amended by 7 Wm. IV. and 1 Vict. c. 22), the certificate of the superintendent-registrar is now held equivalent to publication of banns or episcopal licence. It is only optional, and not obligatory, on the part of the clergy of the Church of England to marry persons who have obtained this certificate (*l*). The method of obtaining it will be treated of under the heading of Nonconformist marriages (*m*).

(e) Presence of a Duly Ordained Minister.—As it has been conclusively laid down that the presence of a duly ordained minister at the ceremony is by the common law indispensable to a complete and regular marriage (*n*), the parties must be married in church (*o*) in the presence of a duly ordained minister of the Church of England. A clergyman cannot validly marry himself; some other clergyman must perform the ceremony (*p*). The question has been debated whether, if a person holding

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(*f*) *Haswell* v. *Haswell and Gilbert*, 51 L. J. P. D. & A. 150.
(*g*) *Bevan* (f. c. *McMahon*) v. *McMahon*, 30 L. J. P. & M. 61.
(*h*) *Ibid.*
(*i*) *Dormer* v. *Williams*, 1 Curt. 870.
(*k*) *Greaves* v. *Greaves*, L. R. 2 P. & D. 423.
(*l*) 19 & 20 Vict. c. 119, s. 11.
(*m*) *Post*, p. 62.
(*n*) *Reg.* v. *Millis*, 10 Cl. & F. 534; *Catherwood* v. *Caslon*, 13 L. J. Ex. 433; *Culling* v. *Culling*, [1896] P. 116; 65 L. J. P. 59.
(*o*) Unless they have a special licence to be married out of church, *ante*, p. 57.
(*p*) *Beamish* v. *Beamish*, 9 H. L. Cas. 274.

himself out to be a properly ordained minister performs the ceremony, but in reality is not a clergyman at all, and the parties are ignorant of his imposture, the marriage is a good one. Lord Stowell, in *Hawke* v. *Corri* (*q*), said it was a generally credited opinion that the marriage should be upheld, because parties who came to be married were not expected to ask for a sight of the minister's letters of orders; and if they saw them they could not be expected to inquire into the authenticity. Sir R. Phillimore (*r*) held that section 22 of Geo. IV. c. 76 (*s*), confirms Lord Stowell's *dictum* in the above case. On the other hand, the presence of an official witness to a marriage ceremony is necessary. The case of *Reg.* v. *Millis* (*t*) has decided that a marriage to be valid at common law must be celebrated in the presence of a duly ordained clergyman of the Church of England; and the Marriage Act of 4 Geo. IV. was passed before that decision was given. One learned writer says: "Marriage according to the forms of the Church of England must be performed by a minister of the Established Church—*per presbyterum sacris ordinibus constitutum*" (*u*). But the judges have avoided deciding the question (*x*), and it is still open. In 1888 a person was convicted of uttering forged letters of orders by means of which he passed as a clergyman of the Church of England and was appointed to more than one living (*y*); while so beneficed he had solemnized several marriages between persons believing him to be properly ordained. Doubts were raised as to the validity of these marriages, and an Act was passed validating them (*z*).

If both parties go through the form of marriage according to the ceremonies of the Church of England before a person whom they know to be not a duly ordained minister, their marriage is

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(*q*) 2 Hag. Con. Rep. 280, 288.

(*r*) Eccl. Law, 804, 805.

(*s*) If any persons shall knowingly and wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriages of such person shall be null and void to all intents and purposes whatsoever.

(*t*) 10 Cl. & F. 534.

(*u*) Cripps, Law of the Church and Clergy, 636.

(*x*) *Rex* v. *Luffington*, Burr. Sett. Cas. 232.

(*y*) *Reg.* v. *Ellis*, Suffolk Summer Assizes, 1888; 16 Cox, C. C. 469.

(*z*) 51 & 52 Vict. c. 28 (Marriages Validation Act, 1888). The author raised these doubts, and communicated them to persons placed in high office, and the Act was passed in consequence. It seemed too full of risk to allow the question of their validity or invalidity to be raised between the parties with the chance of issue being bastardized, the devolution of property altered, and even of attempts made by either party to the marriage to set aside the matrimonial relationship of which he or she might have grown tired.

null and void (*a*). But where the parties honestly believe the person by whom they are married to be a duly ordained clergyman, or official of the authorized class, their marriage ought to be held valid and binding in law, notwithstanding any defect in the orders, title, or authority of the person so officiating; and a general enactment to this effect should be passed.

Celebration.—All marriages, except those on special licence, must be celebrated in church in the presence of two or more witnesses, and between the hours of eight in the morning and three in the afternoon (*b*).

The parties must be married in the church or chapel in which the banns have been published, or which has been mentioned in the licence, unless dispensed with by a special licence (*c*); but a marriage solemnized in a vestry which forms part of the church is good (*d*).

If the parish church or chapel is under repair, marriages may be had in some building in the parish licensed for the performance of divine service; or if there be no such licensed place, then in some adjoining parish or chapelry (*e*).

(2) Requirements of Nonconformist Marriages.—The Acts of 6 & 7 Wm. IV. c. 85, 19 & 20 Vict. c. 119, and 61 & 62 Vict. c. 58, have placed almost all the religious bodies not in communion with the Church of England on an equal footing in respect of the marriages of their members, who now need not have recourse to the churches of the Establishment to render their unions lawful, but can celebrate them in the churches or chapels of their respective denominations. Further, these statutes afford to *all* persons, whether members of the Established Church or Nonconformists, wishing to marry, a choice between a *religious* and *civil* ceremony; and under the first-named Act, for the first time in the history of the matrimonial laws of England, as before noticed, the intervention of one in holy orders was rendered no longer necessary to a regular and valid marriage. Marriage can now be celebrated before a civil officer in a building not set apart for religious worship or before duly authorized persons in properly registered buildings set apart for religious purposes either with or without the pre-

(*a*) 4 Geo. IV. c. 76, s. 22.
(*b*) 49 & 50 Vict. c. 14. This Marriage Act does not extend to Scotland or Ireland.
(*c*) 4 Geo. IV. c. 76, s. 22.
(*d*) *Wing* v. *Taylor* (f. c. *Wing*), 30 L. J. P. & M. 258.
(*e*) 5 Geo. IV. c. 32, s. 2. See *Williams* v. *Williams*, 25 T. L. R. 232.

sence of the civil officer. The preliminary requirements for these marriages, whether with civil or religious rites, are:—

The registrar's certificate, or the registrar's licence.

The Registrar's Certificate.—Persons desirous of obtaining a certificate from the superintendent-registrar for a marriage in some registered building, or in the office of the superintendent-registrar, must give to the superintendent-registrar or respective superintendent-registrars (as the case may be), in whose district or districts they must have lived at least seven days before the application is made, a notice (*f*) containing (i) the name and surname (*g*); (ii) the profession or condition of each of the parties intending marriage; (iii) the dwelling-place of the party giving the notice; (iv) the time during which he or she has dwelt therein (*h*); (v) and the church or other building in which the marriage is to be solemnized (*i*).

This notice is to be accompanied by a solemn declaration, the two forming one document, to be signed and subscribed by the party making it in the presence of the superintendent or district registrar or his deputy, who shall attest the same (*k*). Any false statements in the declaration will be visited with the penalties of perjury (*l*).

The declaration must state: (α) that the declarant believes that there is no impediment of kindred, or alliance, or other lawful hindrance to the marriage; (β) that the parties have for the space of seven days immediately preceding the giving of such notice had their usual place of abode and residence within the district of the superintendent-registrar or respective superintendent-registrars; (γ) that where either of the parties, not being a widower or widow, shall be under age, the consent of the person or persons whose consent to such marriage is by law required has been given, or that there is no such person who could give the requisite consent (*m*). Without this declaration no certificate is to be issued (*n*).

This notice must be suspended or affixed in some conspicuous

(*f*) For what is a due notice under these Acts, see *Holmes* v. *Simmons*, L. R. 1 P. & D. 523; 37 L. J. P. & M. 58.

(*g*) A surname acquired by repute, and not for the purposes of concealment or fraud, though not the true name, is sufficient. *Reg.* v. *Smith*, 4 F. & F. 1099.

(*h*) If either party has resided a full calendar month previous to the application, a statement of residence of "one month and upwards" will be enough.

(*i*) 6 & 7 Wm. IV. c. 85, s. 4.

(*k*) 19 & 20 Vict. c. 119, s. 2.

(*l*) Perjury Act, 1911 (1 & 2 Geo V. c. 6), s. 3 (1).

(*m*) See 6 & 7 Wm. IV. c. 85, s. 10, for those who are entitled to give or withhold their consent.

(*n*) 19 & 20 Vict. c. 119, s. 2.

place in the office of the superintendent-registrar twenty-one consecutive days next after the date of entry in the "Marriage Notice Book" (*o*).

The issuing of the certificate may be forbidden by any person authorized to do so; and if the certificate has issued, the effect of the forbidding is to render all proceedings consequent upon the notice void (*p*). Unless forbidden, the issue of the certificate is made twenty-one successive or clear days after the day of entry of the notice (*q*) by the superintendent-registrar to whom the notice was given (*r*); and the certificate is to hold good for three months from the date of its issue (*s*).

Where a declaration by an Indian Mohamedan intending to marry an Englishwoman set forth that he was divorced according to Mohamedan law from another Englishwoman, but it appeared that the purported divorce was by handing a paper of Talak to her, it was held that she was not divorced, and that the registrar was right in refusing to issue a certificate (*t*).

The Registrar's Licence.—When a marriage is intended on the registrar's licence, the same notice must be given as for a certificate, except that the declaration accompanying the notice must state that one of the parties has had his or her usual place of abode and residence in the district of the superintendent-registrar to whom the notice is given for at least *fifteen* days immediately preceding the giving of the notice (*u*).

On an application for a licence this notice need not be suspended in the registrar's office, but in such case the party giving the notice must state therein that the marriage is intended to be celebrated by licence (*x*). After the expiration of one whole day next after the date of the entry in his "Marriage Notice Book," the superintendent-registrar who received the notice may grant a licence to marry to the party giving the notice, unless its issue has been in the meanwhile forbidden. The licence is valid for three months from the date of its issue (*y*).

(*o*) 19 & 20 Vict. c. 119, s. 4.

(*p*) 6 & 7 Wm. IV. c. 85, s. 9. A caveat on the payment of five shillings may be lodged against the grant of a certificate; and its issue is to be withheld until the caveat is removed, or has been held not to warrant the refusal to issue the certificate. *Ibid.* s. 13.

(*q*) 19 & 20 Vict. c. 119, s. 4.

(*r*) *Ibid.* s. 2.

(*s*) 6 & 7 Wm. IV. c. 85, s. 15; 19 & 20 Vict. c. 119, s. 9.

(*t*) *Rex* v. *Hammersmith Superintendent-Registrar; Ex parte Mir-Anwaruddin*, [1917] 1 K. B. 634.

(*u*) 19 & 20 Vict. c. 119, s. 2.

(*x*) *Ibid.* s. 5.

(*y*) *Ibid.* s. 9.

Wilful false statements, even if made by both parties, would not render a marriage celebrated on a licence null and void on the ground of want of due notice. Under the Perjury Act, 1911, making a false oath or declaration, or statement as to any particular required to be known and registered, or for forbidding the issue of any certificate or licence by representing that he is a person whose consent to the marriage is required by law, is a misdemeanour (*z*), and a forfeiture of property may be ordered at the suit of the Attorney-General (*a*). If persons knowingly and wilfully intermarry without due notice to the registrar, or without a certificate of notice duly issued, the marriage is null and void (*b*); but where in a notice the surname of one of the parties is falsely given, knowingly and wilfully by both parties for the purpose of concealing the marriage, the marriage is not thereby invalidated. The principles applicable to marriages by banns, or after notice without licence, do not apply to a marriage by licence, as no publicity is necessary in the latter case (*c*).

Differences between Certificates and Licences.—The following is a sketch of the differences in the provisions affecting marriages celebrated on a certificate and those celebrated on a licence:—

(1) *Notice.*

(a) *Certificate.*—If the parties intending marriage reside in the districts of different registrars, notice must be given to the registrars of both districts, and must state how long they have resided therein (*d*); and the notice must be suspended twenty-one successive days in the office of the registrar (*e*).

(b) *Licence.*—If the parties live in different districts, notice need be given to the registrar of only *one* district, and only the party giving notice need state how long he or she has had his or her usual place of abode in the district (*f*). The notice need not be suspended at all in the registrar's office (*g*).

(*z*) 1 & 2 Geo. V. c. 6, s. 3.
(*a*) 19 & 20 Vict. c. 119, ss. 18, 19
(*b*) 6 & 7 Wm. IV. c. 85, s. 42.
(*c*) See *Holmes* v. *Simmons*, L. R. 1 P. & D. 523; 37 L. J. P. & M. 58. See also *Reg.* v. *Rea* (1872), L. R. 1 C. C. R. 365; 41 L. J. M. C. 92, where one party inserts a wrong name in the notice without the knowledge of the other party the marriage is nevertheless valid; and *Rutter, In re; Donaldson* v. *Rutter*, [1907] 2 Ch. 592; 77 L. J. Ch. 34, where the misdescription in the notice consisted of an erroneous surname, false place of residence, and wrongly stated condition of "spinster," it was held notwithstanding that the marriage was valid. In a similar case, *Plummer* v. *Plummer*, [1917] P. 163; 86 L. J. P. 145, a decree *nisi* was granted, there being no opposition, but the decree was reversed on the intervention of a child of the marriage petitioning for a declaration of legitimacy.
(*d*) 19 & 20 Vict. c. 119, s. 2.
(*e*) Sect. 4. (*f*) Sects. 2, 6. (*g*) Sect. 5.

(2) *Residence.*

(a) *Certificate.*—Both parties must have had their usual place of abode for *seven* clear days before notice given in their respective districts (if more than one) (*h*).

(b) *Licence.*—The party giving the notice must have resided *fifteen* clear days in the district of the registrar to whom the notice is given, irrespectively of the length of residence of the other party, whether in the same or different districts (*i*).

(3) *Time of Issuing Certificate.*

(a) *Certificate.—Twenty-one* clear days after date of entry in "Marriage Notice Book" (*k*).

(b) *Licence.—One whole day* next after date of entry in "Marriage Notice Book" (*l*).

When the certificate or licence is granted by the registrar the parties are at liberty to marry (according to the ritual of their denomination) in the building (registered for the solemnization of marriage) mentioned in the certificate or licence, and no other (*m*); but the consent of the trustees, owners, deacons, or managers thereof, or of the officiating minister of any registered building of the Church of Rome, or of any church or chapel of the Church of England, must be first obtained (*n*). If both parties knowingly and wilfully marry in some place other than the proper church or building, their marriage is null and void (*o*). The marriage must take place between the hours of eight A.M. and three in the afternoon. If the marriage is not to take place in any of the foregoing churches, or registered buildings, the parties may be married at the registry office in the presence of the superintendent-registrar and some district registrar, under the like conditions as marriages celebrated elsewhere. No religious forms or ceremony are allowed to be used, but the parties must in some part of the ceremony declare that they know of no impediment why they may not be joined in matrimony, and must express their mutual consent to take each other as man and wife (*p*).

Nonconformist Marriages under Marriage Act, 1898.—A further and material alteration in the marriage law of England has been brought about by the Marriage Act of 1898 (*q*). Under

(*h*) Sect. 2.
(*i*) Sects. 2-6.
(*k*) Sect. 4.
(*l*) Sect. 9.
(*m*) 6 & 7 Wm. IV. c. 85, s. 42.
(*n*) 19 & 20 Vict. c. 119, s. 11.
(*o*) 6 & 7 Wm. IV. c. 85, s. 42.
(*p*) 6 & 7 Wm. IV. c. 85, ss. 20, 21; and 19 & 20 Vict. c. 119, s. 12.
(*q*) 61 & 62 Vict. c. 58.

the Registration Act of 1836 (*r*) the presence of the registrar of the district in which the marriage of the Nonconformists (other than Jews and Quakers) was to take place was requisite. This grievance, at once irksome and anomalous, has now been removed. The marriages of Nonconformists may be celebrated (as before) in registered buildings certified to be set apart for religious purposes by the governing body or trustees of the building (*s*), and in the presence of a duly authorized person (*t*), who is defined by the Act to be a person certified as having been duly authorized for the purpose by the trustees or other governing body of the building, or of some registered building in the same registration district (*u*); and the presence of the registrar is not necessary. When the parties do not give notice to the superintendent-registrar of their intention to be married at his office he is to give to one of the parties a certificate entitling them to be married at the registered building of their choice (*x*). But if the parties desire the presence of the district registrar, he is bound to be present (*y*).

The Statutory Rules and Orders, 1909, issued by the Registrar-General with the approval of the Local Government Board under the Marriage Act, 1898, set out in full detail the requirements as to certificate or licence, which are described as "indispensable documents," the duties of the authorized person as to examining the documents, and by personal inquiry ascertaining the correctness of the names and condition of the parties in the certificate or licence. In the course of the ceremony each party must make a declaration that he knows of no lawful impediment to the marriage, and must also use the contracting words: "I call upon these persons here present to witness that I A take thee B to be my lawful wedded wife," or "I A do take thee B to be my wedded wife." A Welsh version of the words is provided. Upon the utterance of the contracting words the parties are man and wife; without them there is no marriage. Directions are also given as to the entry in the marriage register and the issue of certificates, and the correction of mistakes in both, with specimen forms showing the proper way to fill them up and to correct errors therein. A table of the prohibited degrees of kindred and affinity, and explanatory notes, are also included.

(*r*) 6 & 7 Wm. IV. c. 85.

(*s*) So far as Roman Catholics are concerned, the words "trustees or governing body" shall include the bishop or vicar-general of the diocese. Sect. 1 (3).

(*t*) Sect. 4.

(*u*) Sect. 6 (3).

(*x*) Sect. 5.

(*y*) Sect. 10.

The authorized person in whose presence the marriage has taken place must, like the clergy of the Church of England, immediately after the marriage register in duplicate the proper particulars and sign the entry, and see that it is signed by the parties and two witnesses (*z*), and shall at the proper times forward signed copies of the entries in his marriage register book to the superintendent-registrar of his district (*a*). If an authorized person refuses or fails to comply with respect to the solemnization and registration of marriages, he is liable to be convicted either on summary conviction or indictment, and if convicted he ceases to be an authorized person (*b*).

Re-marriages.—Persons after being married civilly before the registrar, at his office, may, if they so desire, add the religious ceremony provided by the church or denomination to which they belong, and the clergyman or minister of such church or denomination may, after notice given to him, and on production of the registrar's certificate, perform the marriage ceremony according to the accustomed rites, as supplemental to, but not in supersession of, the civil ceremony. This religious ceremony is not to be registered as a marriage (*c*). It is sometimes considered expedient to add this second marriage where there has been a civil mixed marriage, as between a member of the Church of England and a Roman Catholic, or Jew; or where parties domiciled in England have married abroad; but this course ought not to be pursued where children have been already born.

Marriages of Quakers and Jews.—The privilege of celebrating their marriages according to their own forms and ceremonies has always been allowed both to Quakers and Jews: to the former, because of their quiet resistance to any pressure put upon them by those in authority to make them conform to the usages of the Established Church (*d*); to the latter, less because of any regard for their feelings if compelled to have recourse to the churches of Christians, than from the idea of the churches being polluted by their presence, and they have ever been reckoned an alien race.

Quakers.—Quaker marriages were excepted from the provisions of 26 Geo. II. c. 33, and 4 Geo. IV. c. 76, and were expressly recognized by 6 & 7 Wm. IV. c. 85, s. 2.

(*z*) Sect. 7. (*a*) Sect. 11. (*b*) Sect. 12.
(*c*) Statutory Rules and Orders, 1909.
(*d*) 6 & 7 Wm. & M. c. 6, ss. 57, 58; Sewell, Hist. of Quakers, 492; and 1 Hag. Con. Rep. Appendix, p. 9.

Marriages according to the rites of Quakers may be celebrated either on the registrar's certificate or licence (*e*), after the usual and proper notice has been given. The persons to be married may be both Quakers, or only one a Quaker, or neither of them a Quaker. When both parties do not, or one party does not, belong to the Society of Friends, the notice to the registrar must be accompanied by a certificate signed by some registering officer of the Society of Friends, to the effect that the party by whom or on whose behalf such notice is given is, or both parties (as the case may be) are, authorized thereto in pursuance of some general rule or rules of the said society (*f*).

After the certificate or licence is obtained, the parties must be married within three months from the date of its issue, but not necessarily in the district or districts in which they dwell (*g*), according to the rites of Quakers, in the presence of some registering officer of the society and of two other witnesses.

Jews.—Jews, like Quakers, were excepted from the provisions of Lord Hardwicke's Act and 4 Geo. IV. c. 76, and their marriages were expressly recognized by 6 & 7 Wm. IV. c. 85, s. 2; but before the latter date the validity of Jewish marriages was accepted by the Courts (*h*).

According to 6 & 7 Wm. IV. c. 85, s. 2, both parties must be Jews in order to contract a valid marriage celebrated in conformity with the Jewish rites; but where the validity of a marriage and legitimacy of children depended upon reputation, a marriage between a Jew and a Christian woman was held valid on evidence of repute that they had lived together as man and wife (*i*).

The question of the validity or invalidity of these marriages is to be settled by the law prevailing among the Jews, and evidence of such laws will be admitted (*k*); and if it appear that the parties are not married by Jewish law, the marriage will be held invalid (*l*). But the capacity of domiciled British Jews to contract marriage is regulated by the law of England; and such Jews are affected by the Table of Prohibited Degrees (*m*). If

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(*e*) 6 & 7 Wm. IV. c. 85, s. 2; 19 & 20 Vict. c. 119, s. 21.

(*f*) 35 Vict. c. 10, s. 1, which repealed the proviso in 23 Vict. c. 18, s. 1, requiring profession with, if not membership of, the society on the part of both persons intending to be so married.

(*g*) 3 & 4 Vict. c. 72, s. 5.

(*h*) *Horn* v. *Noel*, 1 Camp. 61.

(*i*) *Goodman* v. *Goodman*, 28 L. J. Ch. 745.

(*k*) *Goldsmid* v. *Bromer*, 1 Hag. Con. Rep. 324.

(*l*) *Lindo* v. *Belisario*, 1 Hag. Con. Rep. 216, 244.

(*m*) *Re De Wilton*, *De Wilton* v. *Montefiore*, [1900] 2 Ch. 481; 69 L. J. Ch. 717.

Jews are married according to the rites and ceremonies prevailing among Christians, they must conform to the regulations of the Marriage Acts (*n*). Where those present believed in the validity of the ceremony, and the husband afterwards represented himself to be married, the person performing the ceremony at a Jewish wedding in Russia was presumed to be authorized to perform the ceremony (*o*).

After giving the proper and usual notice to the superintendent-registrar, Jews may be married on the certificate or licence (*p*). The marriage must be celebrated in the synagogue of the husband in the presence of the secretary of the husband's synagogue, and be registered by him (*q*). If the man and woman are living in different places, but it is desired to celebrate the marriage in the place where the woman resides, the man must qualify himself as a member of the woman's synagogue. The Act of Wm. IV. does not direct that the secretary of the synagogue shall be present at the marriage, yet he, as the official witness, ought to satisfy himself before registering the marriage of its regularity, and that a due compliance has been made with all requisite and proper formalities. A written contract is necessary for the validity of the marriage, and it has been held that a celebration without a written contract is insufficient (*r*), but the validity of the marriage can be proved without the production of the written contract (*s*).

It will have been noticed that Quakers and Jews have always possessed a privilege which has lately been extended to all nonconforming bodies. At their marriages the presence of a registrar is dispensed with; and the official witness for Quakers is the registering officer of the meeting-house, and for Jews the secretary of the synagogue, and he should sign his certificate both as secretary and registrar (*t*).

Validation of Marriages.—Up to very recent times the usual method of validating a marriage as to the legality of which there existed a doubt by reason of some informality, was the passing of an Act of Parliament declaring such marriage to be good and valid; but now the machinery of Provisional Orders and local inquiries has been applied to such a marriage. A Secretary of

(*n*) *Jones* v. *Robinson*, 2 Phill. 285.
(*o*) *Goldstone* v. *Goldstone*, 127 L. T. 32.
(*p*) 6 & 7 Wm. IV. c. 85, s. 2; 19 & 20 Vict. c. 119, s. 21.
(*q*) *Prager* v. *Prager*, 108 L. T. 734.
(*r*) *R.* v. *Althausen*, 17 Cox, C. C. 630.
(*s*) *Rex* v. *Hammer*, [1923] 2 K. B. 786.
(*t*) *Prager* v. *Prager and Goodison*, 108 L. T. 734.

State (presumably the Home Secretary) may now, in the case of marriages solemnized in England appearing to him to be invalid or of doubtful validity by reason of some informality, make a Provisional Order for the purpose of removing the invalidity or doubt (*u*). The draft of such order is to be advertised not less than one month before the order is made; and the Secretary of State is to consider all objections to it sent to him in writing during the month; and he shall, if it appears necessary to him, direct a local inquiry into the validity of any such objection (*x*). Such order is to have no force unless confirmed by Parliament; and the Secretary of State may bring in a Bill confirming the order. If a petition is presented against the order while the Bill is pending before Parliament, the Bill, so far as it relates to the order, may be referred to a select committee, and the petitioner shall be allowed to appear and oppose as in the case of private Bills (*y*).

SECTION 3.

Marriages of British Subjects celebrated Abroad.

This section deals with a complicated branch of the law, upon which neither legislation nor the decisions of the Court are clear and indubitable.

On Foreign Territory.—The English Courts will recognize the marriages of British subjects sojourning in foreign parts if celebrated according to the forms required in those countries and valid by their laws, and between parties who are not prohibited from contracting marriage by the laws of England by reason of nearness of blood, or affinity, or a previous marriage (*z*). This has been the doctrine of the Courts of England for a long succession of years, and was based on the reason that confusion and mischief would arise if marriages validly celebrated abroad, in accordance with the laws of the place of celebration, were not recognized as good and lawful by the Courts of the domicil of the marrying parties (*a*); but a marriage invalid by the *lex loci celebrationis*, where one of the parties is subject to the local law, is invalid by English law (*b*).

(*u*) Provisional Order (Marriages) Act, 1905 (5 Edw. VII. c. 23), s. 1 (1).
(*x*) *Ibid.* s. 1 (2).
(*y*) *Ibid.* s. 1 (3).
(*z*) *Smith* v. *Smith*, 51 L. J. P. & D. 46.
(*a*) *Scrimshire* v. *Scrimshire*, 2 Hag. Con. Rep. 395. See also *Harford* v. *Morris*, *ibid.* 423, and *Middleton* v. *Janverin*, *ibid.* 437.
(*b*) See *Re Alison's Trusts*, 31 L. T. 638.

Lord Stowell has laid down the principle applicable to the elucidation of these matters—viz., to refer the question of the validity of the marriage to the laws of the place where it was celebrated (*c*). Of course, it is quite competent for the law of England expressly to prohibit certain marriages between those persons who are subject to it; and if English subjects proceed on purpose to evade their own laws to other places where such prohibited marriages are lawful, the English Courts are bound to treat these marriages as null and void (*d*), and this on the clear principle of the territorial sovereignty of England.

The only prohibitions rendering British subjects incompetent to contract valid marriages abroad were *diriment*, such as by the law of England prevented parties from contracting a union that would be recognized by it, viz., incest, and polygamy or a previous marriage. To these, seemingly, a third must be added—a want of capacity to marry by the foreign domicil of the parties. *Impedient* prohibitions, which could be waived or overcome, and concerned the form and ceremony rather than the essence of the contract, were never held to invalidate the marriage of Englishmen contracted abroad in accordance with the requisites of the foreign country. It mattered not whether the parties were *bona fide* sojourning in alien territory, or went there for the sole and evident purpose of evading the restrictions of the law of their domicil (*e*). In either case, if competent to marry by the law of England, they contracted a valid marriage if it conformed to the requirements of the law of the country in which they formed their union.

Foreign Marriage Act, 1892.—Certain exceptions to the rule requiring conformity to the *lex loci celebrationis* have been made in favour of marriages of British subjects, or where one of the contracting parties is a British subject, celebrated outside of the United Kingdom before the proper officer, and in accordance with the statutory requirements (*f*). This branch of the law has been

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(*c*) *Dalrymple* v. *Dalrymple*, 2 Hag. Con. Rep. 54.

(*d*) *Brook* v. *Brook*, 9 H. L. Cas. 193.

(*e*) The Gretna Green marriages afford a clear and unmistakable instance and proof that the English Courts recognized as valid marriages celebrated abroad and satisfying the requisites of the foreign country. The parties who went across the Border could not, and did not, conceal that they went to Scotland for the sole purpose of evading the law of England, which required the consent of the proper parties to a valid marriage. When they had made themselves man and wife by the ceremony *per verba de præsenti*, valid enough in Scotland, though not in England, they turned back, and their marriage was never questioned, or if questioned, was upheld. See *Gardner* v. *Att.-Gen.*, 60 L. T. 839.

(*f*) For other exceptions to the doctrine that conformity to the *lex loci*, at any

codified by the Foreign Marriage Act, 1892 (*g*). The marriage is to be celebrated by or in the presence of a marriage officer (*h*). A marriage officer is one authorized by a warrant issued and signed by a Secretary of State, or one who, under the marriage regulations of the Act, is authorized to act without such warrant (*i*). The following may be authorized by warrant to act as such—(i) A British ambassador, and any officer prescribed as an officer for solemnizing marriages in the official house of an ambassador; (ii) a British consul (*k*); (iii) a British governor, high commissioner, or resident or consular or other officer appointed to act in their place as such marriage officer (*l*); (iv) the commanding officer on board one of H.M. ships on a foreign station (*m*). A marriage officer shall not allow a marriage to be solemnized in his presence, if in his opinion such marriage would be inconsistent with international law or the comity of nations (*n*). The Marriages in Japan (Validity) Act, 1912, c. 15, removed certain doubts as to the validity of marriages where one or both parties were British subjects. Until 1899 certain conditions regulated such marriages, but were then waived, and questions arose as to subsequent marriages, and the Act regularized marriages between 1899 and 1912.

(i) *Marriages in Official House of British Ambassador.*—A British ambassador, if authorized by warrant, or any officer prescribed as a marriage officer (*o*), may solemnize a marriage in the ambassador's official house, or in the Embassy chapel if declared under the Act to be part of the official house (*p*). Where the marriage can be solemnized at a British consulate, the marriage is not to be solemnized in the Embassy house without the leave of the ambassador (*q*).

(ii) *Marriages in Official House of British Consul.*—A consul, if authorized by warrant as a marriage officer, may solemnize in his official house (*r*).

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rate in the matter of forms and ceremonies, is needful for a valid marriage, see *post*, chap. xvi.

(*g*) 55 & 56 Vict. c. 23, repealing the following statutes: 4 Geo. IV. c. 91; 12 & 13 Vict. c. 68; 31 & 32 Vict. c. 61; 53 & 54 Vict. c. 47; 54 & 55 Vict. c. 74.

(*h*) Sect. 8. (*i*) Sect. 11 (*a*), (*b*).

(*k*) This expression includes consul-general, consul, vice-consul, pro-consul, or consular agent. Sect. 24.

(*l*) In such cases the application of the Act is not limited to places outside His Majesty's dominions. Sect. 11 (2) (*c*). (*m*) Sect. 12.

(*n*) Sect. 19. There is, however, a right of appeal to a Secretary of State against such decision.

(*o*) Sect. 21 (*f*). (*p*) Sects. 11, 21 (*b*).

(*q*) Foreign Marriages Order in Council, S. R. & O., 1913, p. 382.

(*r*) The official house is the office at which the business of such officer is transacted.

(iii) *Marriages in Official House of British Governor.*—A governor, high commissioner, resident, consular or other officer, or a person appointed to act as a marriage officer in his place, if authorized by warrant, may solemnize marriage in his official house (*s*).

(iv) *Marriages on Board H.M. Ships.*—The commanding officer of one of H.M. ships on a foreign station shall, without any written warrant, be a marriage officer, and may solemnize marriage on board (*t*). The chaplain of one of H.M. ships may celebrate a marriage on board without a licence (*u*).

One of the parties to a marriage solemnized by any of such marriage officers must be a British subject, or the marriage will not be deemed valid (*x*).

As to the publication of banns on board and the certificate thereof, and as to facilities during the war for the marriage of an officer, seaman or marine where, owing to exigencies of service, the man could not proceed to the particular place of worship when the requirements had been fulfilled, see *ante*, p. 55.

Statutory Requirements.—These are based on the Marriage Registration Acts. One important alteration was introduced by section 9 of the Foreign Marriage Act, 1891, which has been preserved by the statute of 1892 (*y*)—viz., the abolition of the "licence for marriage"; and a marriage can only be solemnized after the notice has been posted for fourteen consecutive days (*z*).

A notice stating names, condition, and residence of the parties, &c., must be signed by one of them and given to the marriage officer within whose district *both* of the parties have had their residence not less than one week preceding the giving of the notice, which must state that they have so resided (*a*). The Foreign Marriages Order in Council, 1913, introduces modifications of the requirements as to residence and notice where both the parties have not had their residence within the district of the marriage officer by or before whom the intended marriage is to be solemnized. The notice is to be filed and a copy suspended in a conspicuous place in the office during fourteen consecutive days (*b*), after which the marriage may be

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(*s*) Sect. 11 (2) (*c*).
(*t*) Sect. 12.
(*u*) *Culling* v. *Culling and Nicholson*, [1896] P. 116; 65 L. J. P. 59.
(*x*) Sect. 1. See *Pertreis* v. *Tondear*, 1 Hag. Con. Rep. 136.
(*y*) 55 & 56 Vict. c. 23.
(*z*) Sect. 3.
(*a*) Sect. 2.
(*b*) Sect. 3.

solemnized at the official house of the marriage officer, with open doors, between 8 A.M. and 3 P.M., before two or more witnesses. The marriage must be solemnized either by the marriage officer or in his presence, whether it is according to the rites of the Church of England or according to any other form or ceremony (*c*).

The marriage must be solemnized within three months after giving the notice, or such notice will be void (*d*).

Caveat.—A caveat may be lodged with the marriage officer, and the marriage is not to be solemnized until such caveat is withdrawn, or the marriage officer is of opinion that it ought not to obstruct the marriage (*e*).

Oath.—Before the marriage the parties must make and subscribe an oath of belief of no impediment to the marriage by reason of kindred or alliance; that both have had for three weeks immediately preceding their usual residence within the district of the marriage officer; and, where either of the parties, not being a widower or a widow, is under twenty-one, that the consent of the proper parties has been obtained (*f*). Making a false oath and notice is subject to the penalties of perjury (*g*), and if any interest has accrued to the offending party by reason of the marriage, the Attorney-General may sue for the forfeiture of such interest (*h*).

The above requirements may be modified in the case of marriages to be solemnized on board ships of war on a foreign station (*i*). Under the Regulations of October 2, 1892, these have been modified by providing that not less than three weeks' notice of the intended marriage should be given in such public manner or to such relations or friends of the parties as to satisfy the commanding officer that as much notice of the intended marriage has been given as if it had taken place in England, and that it was not clandestine.

If a marriage is duly solemnized according to the *lex loci*, where one of the parties is a British subject, a British consul who has personally attended at such marriage may register the

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(*c*) Sect. 8.
(*d*) Sect. 6. A form of notice is given in the Foreign Marriages Order in Council, 1913.
(*e*) Sect. 5.
(*f*) Sect. 7. The form of oath is given in the Foreign Marriages Order in Council, 1913.
(*g*) Perjury Act, 1911 (1 & 2 Geo. V. c. 6), s. 17.
(*h*) Sect. 14.
(*i*) Sect. 12.

marriage in accordance with the marriage regulations as having been so solemnized (*k*). If a marriage by the *lex loci* is recognized as valid by English law, such marriage ought not to take place at an Embassy or consulate unless the marriage officer is satisfied that both parties are British subjects; or if one only is a British subject, the other party is not a subject of the country in which the marriage is to be solemnized; or if one is a British subject and the other a subject of the country, that sufficient facilities for the marriage in that country in accordance with the local law do not exist; or if the man about to be married is a British subject and the woman a subject or citizen of the country, that no objection will be taken by the authorities of the country to the solemnization of the marriage under the Foreign Marriage Act (*l*).

If it appears to the marriage officer that the woman about to be married under the Foreign Marriage Act is a British subject and that the man is a foreigner, he must be satisfied (a) that the marriage will be recognized by the law of the country to which the foreigner belongs; or (b) that some other marriage ceremony, in addition to that under the Foreign Marriage Act, has taken place, or is about to take place, between the parties, and that such other ceremony is recognized by the law of the country to which the foreigner belongs; or (c) that the leave of the Secretary of State has been obtained (*m*).

(v) *Marriages within the Lines of the British Army serving Abroad.*—Marriages solemnized within the British army by any chaplain or officer, or any person officiating under the orders of the commanding officer of a British army serving abroad, shall be effectual and valid (*n*). This is a statutory recognition of the principles of law laid down by Lord Stowell in *Ruding* v. *Smith* (*o*). It is not necessary that there should be a state of actual hostility (*p*).

(vi) *Marriages on Board Ship.*—There is no judicial decision which has recognized, or statute which validates, a marriage celebrated on board of any British merchant ship; but the Merchant Shipping Act, 1854 (*q*), provides for the entry by the master in the official log-book of any marriage taking place on

(*k*) 55 & 56 Vict. c. 23, s. 18.
(*l*) Foreign Marriages Order in Council, 1913, Art. 1 (1).
(*m*) Art. 2.
(*n*) Foreign Marriages Act, 1892 (c. 23), s. 22.
(*o*) 2 Hag. Con. Rep. 371.
(*p*) *The Waldegrave Peerage*, 4 Cl. & F. 649.
(*q*) 17 & 18 Vict. c. 104, s. 282.

the vessel. If both parties were British subjects, and were married by a minister in recognized orders, the marriage would probably be upheld, on the ground that British emigrants carry with them the common law of the country until, *ratione loci*, they become affected by some other law.

Marriages in India.—Before 1851 British subjects in India were held capable of contracting a valid marriage, *per verba de præsenti*, and without the intervention of a minister in holy orders (*r*). Later legislation has placed the marriage laws of that great dependency on much the same basis as those of England. The chief statutes are:—

(i) 14 & 15 Vict. c. 40, an English Act, which provided for the appointment of marriage registrars in India.

(ii) The Indian Act of 1852 [Act V. of 1852], passed to give effect to the provisions of the English Act of the previous year.

(iii) The Indian Marriage Act, 1872 [Act XV. of 1872], enabling marriages between European British subjects to be celebrated:—

(α) By any person who has received Episcopal orders, provided the marriage be celebrated according to the rites and ceremonies of the Church of which he is a member.

(β) By any clergyman of the Church of Scotland, with the like provision as in the preceding case.

(γ) By or in the presence of a marriage registrar under the provisions of 14 & 15 Vict. c. 40, or Act. V. of 1852.

(δ) By any minister of religion who, under the provisions of the Act, has obtained a licence to solemnize marriages.

The solemnization of an Indian marriage may be proved by the production of a certificate of the marriage from the India Office (*s*).

Marriages in the Colonies.—The legislative bodies of the various colonies have authority to pass laws, which become of full effect on receiving the Royal Assent, regulating and providing for marriages within their respective jurisdictions. Marriages celebrated in accordance with the terms of such local Acts are to be held valid in all parts of the British Empire (*t*), except that nothing is to give effect or validity to any marriage unless at the time of such marriage both parties thereto were, according to the law of England, competent to contract the same.

(*r*) *Maclean* v. *Cristall*, Perry's Oriental Cases, 75.
(*s*) *Westmacott* v. *Westmacott*, [1899] P. 183; 68 L. J. P. 63.
(*t*) 28 & 29 Vict. c. 64.

The Marriage of British Subjects (Facilities) Act, 1915 (*u*) enacts that where the law in force in any dominion provides for the publication of banns or for giving notices in respect of marriages between British subjects intended to be solemnized in the United Kingdom, and for the recognition of certificates for marriage issued by the registrars in the United Kingdom in respect of marriages intended to be solemnized in the dominions, His Majesty may by Order in Council declare that the Act applies, and for the purpose (a) of marriages in the United Kingdom colonial certificates for marriage shall have the same effect as English; (b) of marriages in the dominions certificates for marriage may be issued here as if both parties were resident here. Power was given to extend the Act to Protectorates.

By an amending Act in 1916 (*x*), if for the purpose of marriage in the dominions no notice is required on the part of the person resident in the United Kingdom, the previous Act may be applied notwithstanding that the law in force in the dominion makes no provision for the recognition of certificates for marriage issued here.

The provisions of these Acts were applied by Orders in Council in 1916 to New Zealand and Victoria, the Gold Coast, Hong Kong, and various island colonies, and to the Protectorates of East Africa, Gambia, Uganda, etc.; in 1917 to Bermuda, Ceylon, Fiji and Southern Rhodesia; in 1919 to Northern Rhodesia, and in 1920 to New Zealand.

In cases where doubts have arisen from time to time as to the validity of marriages celebrated under various circumstances, and in various places, both at home and abroad, the Legislature has been in the habit of passing Acts validating such marriages; but now by the Marriages Validity (Provisional Orders) Act, 1924, a Secretary of State may remove any doubt as to validity by a Provisional Order subject to advertisement and confirmation by Parliament.

Marriages of Domiciled Foreigners in England.—The English Courts will recognize as valid marriages celebrated in England between domiciled foreigners at the chapels or Courts of their respective ambassadors or consuls (*y*).

(*u*) 5 & 6 Geo. V. c. 40.
(*x*) 6 & 7 Geo. V. c. 21.
(*y*) See *Bailet* v. *Bailet*, 84 L. T. 272.

CHAPTER V.

ACTION FOR BREACH OF PROMISE OF MARRIAGE.

In order to found this action it is necessary that the parties shall have mutually entered into a valid contract to marry; for a mere promise to marry made to one party would not be sufficient foundation for the action unless accepted by the other. The promise and acceptance, however, need not be concurrent, but must be within a reasonable time of each other (*a*). Such agreements are not within the Statute of Frauds, and need not be evidenced by writing (*b*). An expression of intention to marry a person, not in the hearing of the person intended or communicated by the authority of the party expressing the intention, does not amount to such a promise as to sustain the action (*c*). On the other hand, it has been held that the promise to marry need not be proved to have been made in so many words; but the conduct, demeanour, and behaviour of persons towards each other may constitute proof of the contract (*d*).

The gist of the suit is compensation sought for the loss of positive advancement in the world. Marriage is deemed to be advancement in the world, and the reasonable expectations of enjoying this advancement when frustrated are to be compensated by pecuniary damages; just as in other affairs of life, when one party to a contract refuses to fulfil his share of it, he is either compelled specifically to perform it, or is mulcted in damages to the amount of the probable loss occasioned to the other party by his refusal. Specific performance of the marriage promise can no longer be decreed. The action is equally open to the man as to the woman, and in a recent case it has been held that there is an implied condition where the woman breaks off the engagement that the ring shall be returned (*e*). What are known as "sentimental damages," such as for injured feelings, "the wasted years," and the like, on the breach of this contract

(*a*) *Vineall* v. *Veness*, 4 F. & F. 344.
(*b*) *Cork* v. *Baker*, 1 Strange, 34.
(*c*) *Cole* v. *Cottingham*, 8 C. & P. 75.
(*d*) *Hickey* v. *Campion* (1872), 6 I. R. C. L. 557; 20 W. R. 752.
(*e*) *Jacobs* v. *Davis*, [1917] 2 K. B. 532; 86 L. J. K. B. 1497.

alone are allowed to be reckoned in the assessment of the fine (*f*); and the strict pecuniary loss caused by the breach of the defendant—*e.g.*, loss of an establishment in life, or a share of the affluence of the defendant (*g*), is not the only item taken into consideration. Damages are given as an indemnity to the injured party for the loss sustained, and have been always held to embrace the injury to the feelings, affections, and wounded pride as well as the loss of marriage (*h*). The damages, of course, vary with the wealth of the defendant. In assessing the damages for the breach of the contract to marry the jury may take into account, as a matter in aggravation, seduction of the plaintiff by the defendant (*i*).

A promise to marry, without more, is a promise to marry within a reasonable time, otherwise no breach could be assigned (*k*); but a conditional promise to marry is perfectly valid, and no action will lie until the time for its fulfilment has arrived (*l*). If, however, a defendant before the fulfilment of the condition absolutely refuses to carry out his part of the contract, an action will lie (*m*); so, too, where the defendant puts it out of his power to fulfil the contract, as where he marries another person in the meanwhile (*n*).

Promise by Person Already Married.—A married man or woman may be liable on a promise of marriage, provided the plaintiff had no knowledge of the married state of the defendant at the time of the promise (*o*). This was so held on the ground that though seemingly the contract on the part of the married person to marry the plaintiff was illegal, yet the plaintiff was prejudiced by remaining unmarried, and there was a good consideration for the promise to marry (*p*). In two recent cases, however, such promises have been held to be "unenforceable on grounds of public policy as being intrinsically immoral in their nature" (*q*).

(*f*) *Frost* v. *Knight*, L. R. 7 Ex. 111; 41 L. J. Ex. 78.

(*g*) *Jones* v. *James*, 18 L. T. 243; *Berry* v. *Da Costa*, L. R. 1 C. P. 331; 35 L. J. C. P. 191. (*h*) 2 Sedgwick, Damages, 146.

(*i*) *Millington* v. *Loring*, 6 Q. B. D. 190; 50 L. J. Q. B. 214.

(*k*) *Potter* v. *Deboos*, 1 Stark, 82.

(*l*) *Atchinson* v. *Baker*, Peake, Add. Cas. 103.

(*m*) *Frost* v. *Knight* (*ubi sup.*); *Donaghue* v. *Marshall*, 32 L. T. 310.

(*n*) *Harrison* v. *Cage et uxor*, 1 Ld. Raym. 386; *Caines* v. *Smith*, 15 L. J. Ex. 106. See also *Harvey* v. *Johnston*, 17 L. J. C. P. 298; *Short* v. *Stone*, 8 Q. B. 358; 15 L. J. Q. B. 143.

(*o*) *Wild* v. *Harris* (1849), 7 C. B. 999; 18 L. J. C. P. 297; *Millward* v. *Littlewood*, 5 Ex. 775; 20 L. J. Ex. 2.

(*p*) *Wild* v. *Harris* (*ubi sup.*).

(*q*) *Spiers* v. *Hunt*, [1908] 1 K. B. 720; 77 L. J. K. B. 321; and *Wilson* v. *Carnley*, [1908] 1 K. B. 729; 77 L. J. K. B. 594.

Evidence.—By section 2 of the Act of 32 & 33 Vict. c. 68 (*r*) it is enacted that "the parties to any action for breach of promise of marriage shall be competent to give evidence in such action"; but with the following qualification: "That no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise." This evidence, if material, need not be of a robust kind to corroborate the story of the plaintiff (*s*). The corroboration of the promise may consist in conduct of the parties before the promise itself was made (*t*).

If the circumstances of the case make it impossible to prove an express promise either by letters, or by a distinct promise to marry made in the presence of parties other than the plaintiff and defendant, evidence of the conduct of the parties, and how they were regarded by their relations and friends, may be tendered to show that they were an engaged couple, and were so treated by their intimate acquaintances (*tt*).

The leading case on this point is *Bessela* v. *Stern* (*u*). The plaintiff in this case had had a child by the defendant, and alleged that he had promised to marry her. The corroboration put forward to support the promise was contained in two conversations; one between the plaintiff's sister and the defendant previous to the birth of the child, in which the defendant told the sister of the plaintiff that he would marry the latter, or do anything if she would not expose him; the second was after the birth of the child between the plaintiff and defendant, and overheard by the plaintiff's sister; the plaintiff reproached the defendant, and said: "You always promised to marry me, and you don't keep your word." This statement, the sister declared, he did not deny. Grove and Denman, JJ., sitting as a Divisional Court, were of opinion that such evidence was not a material corroboration of the promise within the meaning of section 2 of 32 & 33 Vict. c. 68. The Court of Appeal (*x*), however, reversed their decision, Cockburn, C.J., saying: "The evidence given in corroboration need not go the length of establishing the contract;

(*r*) Evidence Further Amendment Act, 1869.
(*s*) *Hansen* v. *Dixon*, 96 L. T. 32; 23 T. L. R. 56.
(*t*) *Wilcox* v. *Gotfrey*, 26 L. T. 481. See also *Hickey* v. *Campion* (1872), 6 I. R. C. L. 557; 20 W. R. 752.
(*tt*) *Daniel* v. *Bowles*, 2 C. & P. 553.
(*u*) 2 C. P. D. 265; 46 L. J. Q. B. 467.
(*x*) Consisting of Cockburn, C.J., and Bramwell and Brett, L.JJ.

if the evidence support the contract, it is enough." Bramwell, L.J., said: "If we were to hold that that" [referring to the conversation overheard by the sister] "was no evidence of a promise, we should get rid of a great deal of evidence which is given every day at *nisi prius*." But the mere fact that the defendant does not answer letters written to him by the plaintiff, in which she writes that he had promised to marry her, is not corroborative evidence of the plaintiff's evidence of such promise within the meaning of this Act (*y*).

Infants.—The promise to marry is a promise within section 2 of the Infants' Relief Act, 1874 (*z*), and no action will lie against an infant for breach of a promise to marry made while an infant, yet an infant may sue for a breach by the other party if the other party be an adult (*a*). Ratification made after age of a promise made before age will not be treated as a fresh promise in order to take the case out of the above section, unless there is clear evidence that the new promise is quite independent of the promise made during infancy (*b*); and where there is evidence of a new promise by the defendant on attaining majority, it then becomes a question for the jury to say whether or not the words used amount to a mere ratification of the old promise or establish a new promise (*c*). Evidence of language which is equally consistent with a ratification of the old promise as with a fresh promise is insufficient to establish a new promise (*d*).

Statute of Frauds.—This promise was formerly held to be within the Statute of Frauds, and so required the evidence and proof of writing (*e*); but that doctrine has been long exploded, and a promise in writing is not necessary to found an action (*f*).

Action against Executors.—This action cannot be brought by or against executors or administrators of a deceased promisee or promisor on the principal expressed in the maxim, *Actio personalis moritur cum persona* (*h*). It is founded on a breach of contract; but the injury in respect of which damages is

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(*y*) *Wiedemann* v. *Walpole*, [1891] 2 Q. B. 534; 60 L. J. Q. B. 534.
(*z*) 37 & 38 Vict. c. 62. *Coxhead* v. *Mullis*, 3 C. P. D. 439; 47 L. J. C. P. 761; *Northcote* v. *Doughty*, 4 C. P. D. 385; *Ditcham* v. *Worrall*, 5 C. P. D. 410.
(*a*) *Holt* v. *Ward Clarencieux*, 2 Stra. 937.
(*b*) *Coxhead* v. *Mullis* (*ubi sup.*); *Holmes* v. *Brierley*, 59 L. T. 70.
(*c*) *Northcote* v. *Doughty* (*ubi sup.*); *Ditcham* v. *Worrall* (*ubi sup.*).
(*d*) *Holmes* v. *Brierley* (*ubi sup.*).
(*e*) Com. Dig. Action on the Case upon *Assumpsit* (F. 3).
(*f*) *Cork* v. *Baker*, 1 Stra. 34; *Mountacue* v. *Maxwell*, 1 Stra. 236.
(*h*) *Chamberlain* v. *Williamson*, 2 M. & S. 408. *Finlay* v. *Chirney*, 20 Q. B. D. 494; 57 L. J. Q. B. 247.

given is personal; and the damages may be increased by circumstances of aggravation on the part of the promisor, and lessened by the acts of the promisee. The ages and the general behaviour of the respective parties may be taken into account (*i*). With the death of the promisor all claim to damages of a sentimental or exemplary kind ceases. Whether the action will lie at the suit of or against executors if there has been a pecuniary loss resulting to the promisee's estate is not quite clear. In *Chamberlain* v. *Williamson* (*k*) the Court thought if there was a strict pecuniary loss then the action would survive the death of the promisee; and several American cases following the *dictum* in *Chamberlain* v. *Williamson* have so decided; but Lord Esher, M.R., has doubted whether the action would lie against executors even when special damage is alleged (*l*).

If the promisee has suffered any special damage this must be specifically alleged and pleaded; and the mere allegation of special damage will not open the case against the defendant's executors and make them liable. Such special damage can only exist where, in addition to the promise to marry, there existed contemporaneously with that promise another promise affecting the personal property of the one party or the other, which promise would be one of the considerations or part of the consideration for the promise of the other party. Such promise must either be expressed, or circumstances must show that the special damage arising from the breach of such promise must have been in the contemplation of the parties at the time of making the promise.

In a recent case, *Quirk* v. *Thomas* (*Executor of*), the plaintiff brought an action for breach of promise of marriage against the executors of the promisor, in which she claimed as special damage loss suffered by her through having given up a profitable business at the request of the deceased and in consideration of his promise to marry her. The jury having found a verdict for the plaintiff, the learned judge held that the plaintiff was not entitled to maintain the action, upon the grounds that the action was a personal action and was not maintainable against the executor of the promisor, and, secondly, that the loss sustained by the plaintiff was not special damage flowing from the breach. This judgment was affirmed in the Court of Appeal on the ground that there was no corroboration of the plaintiff's

(*i*) Per Lord Esher, M.R., in *Finlay* v. *Chirney* (*ubi sup.*).
(*k*) 2 M. & S. 408.
(*l*) *Finlay* v. *Chirney* (*ubi sup.*).

evidence as required by section 2 of 32 & 33 Vict. c. 68. In the course of his judgment the late Lord Justice Swinfen Eady stated: "I must add that I have grave doubts whether the action will lie, even if special damage be proved. The action is really an action for a breach arising from the personal conduct of the defendant and affecting the personality of the plaintiff. In such an action the injury is treated as a personal one, and damages are awarded in respect of the personal injury to the plaintiff occasioned by the personal conduct of the defendant . . . the damages are entirely at large, and, whatever matters are taken into account, the damages awarded are one lump sum. It is difficult to see how, in such a case, there can be any 'special damage' properly so called. The sounder view appears to be that the action will not lie in any case after the death of the promisor" (*m*). Damages for seduction and birth of a child are not such special damages as will survive against an executor (*n*).

Defences to the Action.—The defences to the action for breach of promise of marriage, or reasons why the defendant should be held harmless for non-fulfilment of the contract, are for the most part based upon fraud, or something akin to fraud, on the part of the plaintiff. In putting them forward, the defendant alleges that the promise to marry would never have been made or accepted had the true state of facts connected with the plaintiff been fully disclosed before the making or accepting of the promise.

(1) A false representation, or fraudulent concealment in material particulars, of the pecuniary circumstances or previous life of the plaintiff (*o*).

(2) A secret disposition of the plaintiff's property with a view to defraud the defendant of a just share of its enjoyment; but fraud must be of the essence of such secret disposition (*p*). It would seem doubtful whether, if the woman possessed of property desired to settle it to her separate use, contrary to the man's wish, and he refused to marry her for that reason, and she brought an action for the breach, the defendant would have

(*m*) [1916] 1 K. B. 516; 85 L. J. K. B. 519.

(*n*) *Ibid.* The *dicta* in this case of Esher, M.R., and Bowen, L.J., as to what may be special damage capable of founding an action that will survive the death of the promisor, were not followed in *Quirk* v. *Thomas* (*ubi sup.*).

(*o*) *Foulkes* v. *Sellway*, 3 Esp. 336; *Wharton* v. *Lewis*, 1 C. & P. 529; *Horam* v. *Humphreys*, Lofft, 80; *Foote* v. *Hayne* (1824), 1 C. & P. 545, 546; *Beachey* v. *Brown* (1860), E. B. & E. 796.

(*p*) 1 Rop. H. & W. 166 n.

a good defence to the action. This fraudulent disposition of the woman's property would appear to be a good defence even under the altered state of the law as to the marital rights of a husband, because he may have looked forward to share in the woman's fortune under a settlement.

(3) Impotence of the plaintiff discovered after the promise is a good defence. Impotence of the man or woman is an impediment to a marriage and ground for a suit for nullity, and so would clearly entitle either of the parties, on the discovery of such an impediment, to rescind the contract. But it is not open for either party to set up his or her incapacity (*q*). Mental or physical infirmity of the plaintiff, supervening or becoming known to the defendant after the date of the promise, may be a good defence in certain cases (*r*). This question is discussed in the case of *Jefferson* v. *Paskell*, where it was suggested that the plaintiff was tuberculous, but she giving general evidence of good health, it was held that the onus lay on the defendant to prove that she still suffered. The fact that the defendant honestly and on reasonable grounds believed that the plaintiff was unfit for marriage is no defence to an action for breach of promise of marriage if the plaintiff was not in fact unfit, but only affects damages (*s*). On the other hand, where the defendant was a physical wreck, the plaintiff secured only nominal damages (*t*). Again, lunacy, either at the time of the making or the breaking of the promise, is a good defence to the action, but not if the defendant, though having formerly been a lunatic, was of sound mind at the time and after the making of the promise (*u*). Slight bodily or mental infirmities discovered after promise made are not sustainable grounds for a breach of the contract.

(4) If the defendant can prove that the plaintiff, being a woman, was of bad character, he will have a good defence to this action when brought by the woman (*x*). Thus, where it was proved that the plaintiff had had a child, and the defendant was not its father, and that the defendant broke his promise

(*q*) *Hall* v. *Wright* (1858), E. B. & E. 746; 29 L. J. Q. B. 43.

(*r*) *Atchinson* v. *Baker*, Peake, Add. Cas. 103, where the plaintiff, a man who was in sound health at the time of making the contract, was subsequently found to be suffering from an abscess in the breast, it was held that the defendant was justified in breaking off the engagement.

(*s*) [1916] 1 K. B. 57; 85 L. J. K. B. 398.

(*t*) *Gamble* v. *Sales*, 36 T. L. R. 427.

(*u*) *Baker* v. *Cartwright*, 10 C. B. (N.S.) 124; 30 L. J. C. P. 364; *Liddell* v. *Easton's Trustees*, [1907] S. C. 154.

(*x*) *Foulkes* v. *Sellway* (*ubi sup.*).

because he had found the plaintiff to be a loose and immodest woman, and that he was unaware of her character at the time of making the promise, the jury were directed to find a verdict for the defendant (*y*). But if the defendant knew at the time of making the promise that the woman was of a loose and immodest character, he is bound by his promise (*z*).

(5) If the plaintiff's conduct towards the defendant since the making or acceptance of the promise has been violent, or rough, or brutal, the defendant is entitled to say that he or she will not intrust his or her lifelong happiness to the keeping of such a one (*a*).

(6) A release by the plaintiff of the defendant is a good defence; a plea, therefore, that before breach the plaintiff had absolved, exonerated, and discharged the defendant was held, on its proof, to entitle him to a verdict (*b*). Such discharge or release may be presumed from the parties not corresponding or meeting for a long time, as, for instance, two years (*c*).

Prior Engagement no Defence.—A prior engagement of the defendant is no defence, though a fraudulent concealment of a previous engagement on the part of the plaintiff might decidedly affect the plaintiff's right to recover (*d*).

Judgment.—Until judgment is signed by the plaintiff in an action for breach of promise, the plaintiff is not a creditor of the defendant (*e*).

(*y*) *Baddeley* v. *Mortlock*, Holt, 151; *Irving* v. *Greenwood*, 1 C. & P. 350; *Bench* v. *Merrick*, 1 C. & K. 463; *Young* v. *Murphy*, 3 Scott, 379.

(*z*) See *Irving* v. *Greenwood* (*ubi sup.*), and *Bench* v. *Merrick* (*ubi sup.*).

(*a*) *Leeds* v. *Cook*, 4 Esp. 257.

(*b*) *King* v. *Gillett*, 7 M. & W. 55; *Davis* v. *Bomford*, (1861), 6 H. & N. 245; 30 L. J. Ex. 139. In this case the defendant asked the plaintiff to return him his letters, which she refused to do, but subsequently went away to reside at a distance.

(*c*) *Davis* v. *Bomford* (*ubi sup.*).

(*d*) *Beachey* v. *Brown* (1860), E. B. & E. 796; 29 L. J. Q. B. 105.

(*e*) See *Reg.* v. *Hopkins*, [1896] 1 Q. B. 652.

CHAPTER VI.

MARRIAGE SETTLEMENTS.

This chapter will be divided into seven sections for convenience of reference, as follows:—

1. Introductory.
2. Settlements generally: (a) Those founded on valuable consideration; (b) voluntary settlements.
3. Covenants in settlements.
4. Construction of settlements.
5. Enforcement of settlements.
6. Rectification of settlements.
7. Revocation and setting aside of settlements.

Section 1.

Introductory.

A marriage settlement has been described as "an instrument executed before marriage, and wholly or partly in consideration of it, by which the enjoyment and devolution of real and personal estate is regulated" (*a*). Post-nuptial settlements are also called "marriage settlements," but, as will be seen, the consideration of marriage is wanting.

In order to make a settlement in consideration of marriage fully operative, it is, of course, necessary that the intended marriage should take place; and where the parties, after settling their property on certain trusts, and executing the deed, do not marry, but show by their conduct that they consider the trusts of the deed are at an end, the contract will be rescinded, and the trusts of the settlement declared to be at an end (*b*).

Objects of a Marriage Settlement.—The object of a settlement made on marriage, equally with that of the wider

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(*a*) Wat. Comp. Eq. 549. For a full disquisition on this important topic the reader is referred to Vaizey on Settlements, and Bythewood and Jarman's Conveyancing (4th ed.), vol. vi.

(*b*) *Essery* v. *Cowlard*, 26 Ch. D. 191; 53 L. J. Ch. 661; *Bond* v. *Walford*, 32 Ch. D. 238; 55 L. J. Ch. 667.

family settlement, is the preservation of property, real and personal, in a particular family, or in the new group to be formed by the union of the spouses. By it the dissipation of the property of the husband or of the wife by reckless extravagance or unfair dealing is checked and prevented. Provision is made for suitable maintenance during the life of the parties and of the survivor (*c*). The rights of husband and wife in each other's property, and of those who will be the fruit of the union, or of those who are to take in default of such issue, are declared.

At Common Law.—Marriage formerly operated at common law as a conveyance to the husband (absolutely as regards her personalty, and for the period of coverture, or for life, as regards her realty) of all the property of the wife at the time of the marriage, and that which was subsequently acquired by her, save such as was settled to her separate use in accordance with equity doctrines. The wife had no corresponding right and advantage, though, it is true, she had a right to be dowered of her husband's lands, and to share on his intestacy in the third or half of his personal property, as the case might be; but since the Dower Act, 1834, he has been enabled to defeat and determine her right to both kinds of property by a disposition during his life or by will. The Married Women's Property Act, 1882 (*d*), has wrought a considerable change in the relations of husband and wife, by allowing her to retain all her property and by giving her absolute control over it; and both these facts have a material bearing on the present subject of marriage settlements. This Act in no way affects the right and capacity of a husband or third party to settle property on the wife, nor does it prevent a wife from settling her property on marriage in any lawful manner she may think fit. On the contrary, it provides that:

"Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument" (*e*).

(*c*) "There are three points to be looked at in a settlement—the destination of the income, the mode in which the capital is to be limited to the children, and the way in which it is to go if there are no children who acquire an indefeasible interest in it." Per Baggallay, J.A., in *Cogan* v. *Duffield*, 2 Ch. D. 44, 49; 45 L. J. Ch. 307.

(*d*) 45 & 46 Vict. c. 75. (*e*) Sect. 19.

The effect of this change in the law is that a woman may, after the coming into operation of the Act, alone, and without any covenant on the part of her husband, make a settlement of the real and personal property to which she is entitled at the time of her marriage, or acquired by her during coverture, as she might have settled it previously to the passing of the Act, but subject to the claims of her ante-nuptial creditors; and that any settlement existing before the Act will not be interfered with or affected (*f*).

It was formerly held that a covenant by the husband to settle after-acquired property, even though unaccompanied by any obligation binding the wife, attached to and bound as against the wife all property which, but for the Married Women's Property Act, 1882, would have come to the husband *jure mariti*, even though she were an infant at the date of the settlement.

The Married Women's Property Act, 1907 (*g*), s. 2 (1), however, provides that, "Notwithstanding section nineteen of the Married Women's Property Act, 1882, a settlement or agreement for a settlement made after the commencement of this Act by the husband or intended husband, whether before or after marriage, respecting the property of any woman he may marry or have married, shall not be valid unless it is executed by her if she is of full age, or confirmed by her after she attains full age.

"(2) But if she dies an infant any covenant or disposition by her husband contained in the settlement or agreement shall bind or pass any interest in any property of hers to which he may become entitled on her death and which he could have bound or disposed of if this Act had not been passed."

This Act also enacts that a married woman alone shall be the protector of a settlement in respect of a prior estate which, by virtue of the Act of 1882, is made her separate property.

Owing to the unlimited control of the wife over her property conferred by the Act of 1882, the matrimonial rights and duties of the spouses will require more than ever to be accurately ascertained, defined, and set forth.

(*f*) Where a woman married before the coming into operation of this Act (January 1, 1883) has entered into a binding covenant to settle after-acquired property, this section has much modified the full power of disposition over her property conferred by the other sections of the Act. *Re Stonor's Trusts*, 24 Ch. D. 195; 52 L. J. Ch. 776; *Hancock* v. *Hancock*, 38 Ch. D. 78; 47 L. J. Ch. 396. See *post*, Covenants to settle after-acquired property.

(*g*) 7 Edw. VII. c. 18.

Trustees.—The Married Women's Property Act, 1882, provided that married women might hold their property without the intervention of a trustee (*h*); but the necessity for the appointment of trustees still existed, if not to protect her interests, to protect those of the children, and the Legislature has recognized the necessity for trustees by providing in the Settled Land Act, 1925 (*i*), that if there are no trustees of a settlement, in default of a person able and willing to appoint trustees, an application shall be made to the Court for their appointment. If at any time there are no trustees, or it is expedient that new trustees shall be appointed, the tenant for life, statutory owner, or other person having under the settlement an estate or interest in the settled land in possession, remainder, or otherwise (or, in the case of an infant, the testamentary or other guardian or next friend), may apply to the Court, and the Court may, if it thinks fit, appoint fit persons to be trustees of the settlement (*k*). On the appointment of such trustees a supplemental vesting instrument is to be executed declaring that the persons so appointed are trustees, and a memorandum is to be indorsed on the last or only principal vesting deed (*l*). Capital moneys arising under the Act are not to be paid to less than two trustees, unless the trustee is a corporation (*m*). Under the Law of Property Act, 1925 (*n*), by any settlement creating a trust, a trust corporation may be nominated to whom notices of dealings may be given, and in default the trustees, if any, of the instrument or the Court may make the nomination. The Settled Land Act, 1925 (*o*), makes provision for the protection of trustees, and prevents the legal estate in settled land vesting in the trustee in bankruptcy (*p*), and enacts (*q*) that sections 59 and 60 of the Settled Land Act, 1882, are to be deemed always to have applied, although the infant was a married woman, section 59 recognizing an infant as a tenant for life, and section 60 enabling the powers of an infant tenant for life to be exercised by the trustees of the settlement or by such person as the Court may appoint. The Trustee Act, 1925 (*r*), provides that no more than four trustees are to be appointed in a settlement of land, and where more than four

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(*h*) Sect. 1 (1).
(*k*) Sect. 34.
(*m*) Sect. 94 (1).
(*o*) 15 Geo. V. c. 18, ss. 96-98.
(*q*) Fourth Schedule, s. 16.
(*i*) 15 Geo. V. c. 18, s. 9 (3).
(*l*) Sect. 35 (1).
(*n*) 15 Geo. V. c. 20, s. 138 (1).
(*p*) Sect. 103.
(*r*) 15 Geo. V. c. 19, s. 34.

are named, the first four named shall act alone if able and willing to act.

Vesting Deed and Trust Deed.—In regard to real property, the Settled Land Act, 1925, s. 4, provides that every settlement of land *inter vivos* shall be effected by two deeds—one a vesting deed, conveying the land to the tenant for life, and, if more than one, as joint tenants; and the other, a trust deed, declaring the trusts affecting the settled land and appointing or constituting the trustees of the settlement, stating the power to appoint new trustees, and their powers (if any) in extension of those conferred by the Act, and bearing the *ad valorem* stamp duty. Where settlements are created by the will of a person who dies after January 1, 1926, the will is deemed to be the trust deed, and where settled land is vested in the legal personal representative of a person dying before that date, the settlement is deemed to be the trust deed (section 6). Forms of vesting deeds, and of a trust instrument in consideration of an intended marriage, are contained in the First Schedule to the Act.

Registration.—The Settled Land Act, 1925 (*s*), provides that a contract or other liability created after January 1, 1926, for the settlement of land or of an equitable estate or entailed interest, or a base or determinable fee, or any corresponding interest in leasehold land (in the latter case, where the interest takes effect free from equitable interests and powers under every prior settlement), shall be deemed an estate contract within the meaning of the Land Charges Act, 1925, and may be registered as a land charge accordingly, and effect shall be given thereto by a vesting deed and a trust instrument. The contract and liability to make a settlement is sufficiently complied with if effect is given thereto by a vesting deed and a trust instrument (*t*).

Who can make Marriage Settlements.—In general, all persons are competent to make binding marriage settlements, except lunatics and infants. A woman under coverture was incapacitated in most instances from making a valid settlement without the concurrence of her husband, unless she was exercising a power given to her in that behalf, or she was dealing with her separate estate (*u*), but now her right to make a settlement is a necessary incident of her absolute ownership of her property. There does not appear to be any case in which the question of a marriage

(*s*) 15 Geo. V. c. 18, s. 11 (1).
(*t*) Sect. 11 (2).
(*u*) Peach. Sett. 24.

settlement made by a lunatic has been involved; but if ever it should come up for discussion, it may be laid down with confidence that the ordinary rules governing the contracts of lunatics will be applied, viz., that if the contract was executed by a lunatic when insane, it would be set aside: and, on the contrary, would be upheld if executed by him during a lucid interval, or while he was sane, though he subsequently became afflicted with lunacy.

Infants.—As in another portion of this work the marriage settlements of infants will be more particularly set forth (*x*), it will here suffice to say that marriage settlements executed by infants are, except under certain circumstances, voidable (*y*). It was once thought that the consent of guardians could supply and fill up the requisite authority, but this is no longer the law (*z*). But a female infant, it appears, may on marriage be bound in certain respects, and in the matter of certain kinds of property; thus, it has been decided the right of dower may be barred by a proper provision of jointure made for her before marriage, and she may be barred of her share of her husband's personal estate under the Statute of Distributions, where a provision is made for her by settlement (*a*). The abolition of the right of dower by the Administration of Estates Act, 1925, s. 45 (*b*), and the new rules as to distribution of estates on intestacy set out in s. 46, will not, it is submitted, affect the principle of these decisions as to an infant being bound in other respects.

The powers conferred by the Infants Settlement Act, 1855 (*c*), are not affected by the Settled Land Act, 1925, provided that a legal estate is not to be vested in the infant. Under that Act infants intending to marry may apply by petition to the Court of Chancery (they are not, however, thereby constituted wards of Court), and with the approbation of the Court make binding settlements of their real and personal estate on marriage. The limitation of the ages of the applicant is for males twenty years, and for females seventeen years. This Act removed the disability of infancy only, but so far as married women were concerned left untouched the disability of coverture. Where

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(*x*) *Post*, Part IV., Infancy, chap. iv.
(*y*) See *Smith* v. *Lucas*, 18 Ch. D. 531.
(*z*) *Field* v. *Moore*, 24 L. J. Ch. 161.
(*a*) *Drury* v. *Drury*, 2 Ed. 39; *Earl of Buckinghamshire* v. *Drury*, 2 Ed. 60 But see remarks of Lord Herschell on this case in *Seaton* v. *Seaton*, 13 App. Cas. p. 67; 57 L. J. Ch. 661.
(*b*) 15 Geo. V. c. 23.
(*c*) 18 & 19 Vict. c. 43.

an infant ward of Court married without leave and afterwards executed a post-nuptial settlement sanctioned by the Court, by which she purported to settle certain reversionary property her title to which was under a will becoming operative before Malins' Act (*d*) came into force, and so not within its application, though she subsequently recognized the settlement by various acts, it was held that neither the sanction of the Court nor the effect of the Infants' Settlement Act could make the settlement of the reversionary interest binding upon her; and that no acts of acquiescence and confirmation will have that effect unless they amount to an actual disposition by her of the property when discovert (*e*). Notwithstanding the decision of Selborne, L.C., and Fry, L.J. (Cotton, L.J., dissenting), in *Sampson* v. *Wall* (*f*), and the case of *Re Phillips* (*An Infant*) (*g*), doubt has been thrown upon the question whether the Infants' Settlement Act applies to a post-nuptial settlement (*h*). The marriage settlement of an infant is not within the Infants' Relief Act, 1874 (*i*).

Operation of a Marriage Settlement.—The operation of a marriage settlement when executed is to affect all the property comprised in it or affected by its provisions, such as property to be acquired in the future, and agreed between the parties to be settled in a particular manner. All classes of property may be brought into settlement, and regulated by it in various ways, and its directions will be carried out where they do not violate legal principles. The respective rights of husband and wife as to future property depend upon the terms of the settlement; the husband does not become entitled to his wife's future property because a settlement has been made on her by him, without a stipulation to that effect (*k*).

The husband is usually deemed liable to pay the costs of the marriage settlement (*l*), but the Court will sometimes order the costs to be paid out of the funds of the wife where she is a ward of Court (*m*).

The Law of Property Act, 1925, in the Second Schedule of

(*d*) 20 & 21 Vict. c. 57.
(*e*) *Seaton* v. *Seaton*, 13 A. C. 61; 57 L. J. Ch. 661; affirming S. C. *Buckmaster* v. *Buckmaster*, 35 Ch. D. 21; 56 L. J. Ch. 379.
(*f*) 25 Ch. D. 482; 53 L. J. Ch. 457.
(*g*) 34 Ch. D. 469; 56 L. J. Ch. 337.
(*h*) *Seaton* v. *Seaton* (*ubi sup.*).
(*i*) *Duncan* v. *Dixon*, 44 Ch. D. 211; 59 L. J. Ch. 437.
(*k*) *Garforth* v. *Bradley*, 2 Ves. Sen. 677; *Carr* v. *Taylor*, 10 Ves. 574.
(*l*) *Helps* v. *Clayton*, 17 C. B. (N.S.) 553.
(*m*) *De Stacpoole* v. *De Stacpoole*, 37 Ch. D. 139; 57 L. J. Ch. 463

Part V., gives a form of implied covenant by a person conveying as settlor by which he undertakes to execute all further assurances and do all things necessary for further or more particularly assuring the subject-matter of the conveyance.

Section 2.

Settlements founded on Valuable Consideration.

The consideration of marriage is not only what is known as "valuable," but is one of the highest known to the law, and supports contracts and engagements without any further consideration, pecuniary or otherwise (*n*). These settlements, founded on valuable consideration, whether that of marriage, or pecuniary, may be thus subdivided:—

i. Ante-nuptial agreements, including (a) Inchoate or imperfect settlements, that is, marriage articles, or heads of agreement not under seal, in which the trusts are executory; (b) Complete and final settlements under seal, in which the trusts are executed; and these may be further subdivided, as being made (α) in pursuance of marriage articles; or (β) not in pursuance of marriage articles.

ii. Post-nuptial settlements, if made in pursuance of marriage articles, or if founded on valuable consideration, pecuniary or otherwise.

Marriage Articles.—Marriage articles are usually drawn up between the contracting parties and others interested in the marriage, when for some reason there is a hindrance to the drawing up of a more elaborate and complete settlement. Risks attend this course, and especially in the case of real property, and it were better that a complete and final agreement should be settled before the marriage. In preparing articles of settlement, as little as possible should be left to construction, and the limitations and provisions should be as formally and fully expressed as possible.

These minutes or articles forming the agreement or promise need not be contained in one document, but may be gathered from several letters, though written to a third person (*o*); they may also be contained in a bond (*p*). There is no necessity for

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(*n*) *Greenwood* v. *Lutman*, [1915] 1 I. R. 266.
(*o*) *Luders* v. *Anstey*, 4 Ves. 501. (*p*) *Acton* v. *Pierce*, 2 Vern. 480.

their being of a formal character, provided that they are complete in themselves (*q*). The promise must be absolute, and not one which is left to the option of the promisor to carry out or not (*r*); and a mere expression of a desire or intention to carry out a particular arrangement will not, as a rule, amount in equity to a binding promise or agreement (*s*). But a representation reduced into writing and made by one party for the purpose of influencing the conduct of the other party will in general entitle the party to whom it has been made to the assistance of the Court for the purpose of realizing such representation (*t*), on the principle that where one makes a representation to another, in consequence of which that other contracts engagements, or alters his position, he cannot withdraw from the representation, but is bound by it.

Marriage settlements are excepted out of the provisions of the Bills of Sale Act, 1878 (*u*), and do not require registration as bills of sale (*x*).

Complete and Final Settlements under Seal.—It is this class of settlements that ought, whenever practicable, to be entered into, for security and convenience are obtained thereby; and less room for doubt and consequent litigation exists. Under the provisions of the Settled Land Act, 1925 (*y*), where a legal estate in land is made the subject of a settlement it has to be effected by two deeds, namely, a vesting deed and a trust deed. The vesting deed is to convey the legal estate to the tenant for life or statutory owner (and if more than one, as joint tenants), but where such legal estate is already vested it is sufficient if the vesting deed declares that the land is vested for such estate. Every vesting deed must contain (a) a description either specific or general of the settled land; (b) a statement that the land is vested in the tenant for life upon the trusts affecting the settled land; (c) the names of the trustees of the settlement; (d) the powers, if any, expressly conferred in extension of the powers under the Act; (e) the name of any person who has power to

(*q*) *Lady Thynne* v. *Earl of Glengall*, 2 H. L. Cas. 131.

(*r*) *Randall* v. *Morgan*, 12 Ves. 67.

(*s*) *Maunsell* v. *Hedges and White*, 4 H. L. Cas. 1039; but see *Alt* v. *Alt*, 4 Giff. 84; 32 L. J. Ch. 52; *Walford* v. *Gray*, 12 L. T. 437; *Re Lindria*, *Lindria* v. *Fletcher* (1913), 109 L. T. 623.

(*t*) *Hammersley* v. *De Biel*, 12 Cl. & Fin. 45; *Coverdale* v. *Eastwood*, L. R. 15 Eq. 121; 42 L. J. Ch. 118. But see *Re Fickus*, *Farina* v. *Fickus*, [1900] 1 Ch. 331; 69 L. J. Ch. 161.

(*u*) 41 & 42 Vict. c. 31.

(*x*) Sect. 4. See *Reis*, *Ex parte Clough*, [1904] 2 K. B. 769; 73 L. J. K. B. 929; affirmed *sub nom. Clough* v. *Samuel*, [1905] A. C. 442.

(*y*) 15 Geo. V. c. 18, s. 4.

appoint new trustees. Model forms are provided in the First Schedule to the Act.

Settlements may or may not be made in pursuance of marriage articles.

(α) *In Pursuance of Marriage Articles.*—The difference between marriage articles and a settlement is, that the former contemplate some further and future settlement; while a settlement, on the contrary, is the expression of a past agreement between the parties. The result is that the strict legal construction of the words in articles will not be regarded, but the intention of the parties will have effect given to it as nearly as may be; but a final settlement will not be treated as executory, and will not in general, unless there are grounds for reforming it, be varied or altered, but must be construed as at law (*z*).

(β) *Settlements not in pursuance of Marriage Articles.*—The arrangements between the intended husband and wife, and those interested in their union, are usually contained in settlements executed before the marriage, and not based upon previous articles. Where both sides purpose bringing property into settlement, the ordinary course pursued is for the woman to make proposals for settling her property; these are submitted to the man, who either accepts them *in toto*, or suggests alterations. He then carries in his proposals, and if the property settled on both sides is personalty, the settlement is usually contained in one deed. If, on the other hand, realty and personalty are settled, there is frequently a separate deed dealing with each class of property; so, also, where there exist complicated arrangements affecting the property to be brought into settlement by one side, such property is usually dealt with in a separate deed.

What may Form the Subject of a Settlement.—"Every description of property, real or personal, may form the subject of a marriage settlement, but a family settlement having for its object to preserve the family property is almost always the settlement of a landed estate. The two distinct objects of appropriating a fund to answer the purposes of a family provision, and of settling an estate so as to preserve it entire, and at the same time charge it with answering the moral obligations of its successive owners, with jointures for their widows and portions for their younger children, gave rise to two types or classes of settlements, commonly distinguished as settlements of personal

(*z*) *White* v. *Thornborough*, 2 Vern. 702.

estate, and settlements of real estate. Not that the subject-matter of settlements of the former class is invariably personal estate, or of the latter real estate, for through the artifice of a trust for sale and declaration of the trusts of the proceeds, land is often the subject of a settlement, which for most purposes must be classed with money settlements. On the other hand, personal estate is occasionally, though less frequently, settled by means of a trust for the purchase of land, or otherwise, in such a manner as that the bulk of the property, subject only to deductions to meet charges of the same nature as those ordinarily imposed upon real estate, shall devolve entire upon the successive takers in the way of strict settlement, or in modes bearing more or less of resemblance to a strict settlement. But of the two classes of settlement what may be looked upon as the type or standard example of the former class is a marriage settlement of stock or of money under some other usual form of investment; while a strict settlement of real estate, that is, a settlement with at least one life estate followed by successive estates tail, and provisions appropriate to this mode of devolution, constitutes the standard form of the latter class of settlement" (*a*). The framework of modern settlements was much curtailed by the Conveyancing and Law of Property Act, 1881 (*b*), and the Settled Land Act, 1882 (*c*), which conferred upon trustees various powers which need not be expressed, but which were to be deemed to be inserted in the settlements, unless the contrary intention was expressed. These Acts are now replaced almost entirely by the Law of Property Act, 1925, and the Settled Land Act, 1925, and the Schedules to both Acts which contain model forms (*d*).

Post-nuptial Settlements.—These are founded on valuable consideration, (α) where they are based on ante-nuptial articles; (β) or where valuable consideration moves after the marriage has taken place.

(α) *Post-nuptial Settlements based on Ante-nuptial Articles.* —If the post-nuptial settlement be made in pursuance of articles entered into before the marriage, valuable consideration will be imported, and the settlement will not be voluntary, whether it mentions or omits any reference to the articles. The ante-

(*a*) 3 Dav. Prec. Pt. I. p. 3. For the frame of settlements, both personal and real, see the same vol., pp. 6 and 257.
(*b*) 44 & 45 Vict. c. 41.
(*c*) 45 & 46 Vict. c. 38.
(*d*) For other forms, see Wolstenholme's Forms and Precedents, and Cavanagh on Modern Conveyancing: Bythewood and Jarman on Conveyancing (4th edit.), vol. vi.; and Vaizey on Settlements.

nuptial agreement must not merely be parol, but in writing (*e*), unless there has been an actual transfer to trustees of the property so agreed to be transferred, and held by them on the trusts declared (*f*); for agreements in consideration of marriage are within the fourth section of the Statute of Frauds. The articles are founded upon the valuable consideration of marriage, which is carried on to the post-nuptial and otherwise voluntary arrangement. Thus it follows that a post-nuptial settlement, based upon marriage articles, must conform strictly to them, for wherever it does not do so, it will be purely voluntary (*g*). A mere recital in the post-nuptial deed of ante-nuptial articles is insufficient evidence of their existence, and the deed will not be supported against a subsequent purchaser for value (*h*). But a post-nuptial settlement following an ante-nuptial parol agreement by one of the parties recited in the post-nuptial settlement is good and valid so far as the Statute of Frauds is concerned, for the executed settlement is a sufficient note or memorandum of the contract to be enforced against the party sought to be charged within section 4 of the statute, and may be enforced against his creditors (*i*). So, too, any document stating the facts and terms of the ante-nuptial contract, but signed by the party sought to be charged even after the marriage has taken place, will be a sufficient compliance with the statute (*k*). An agreement for a marriage settlement, or marriage articles, though informal, are within the exception of section 4 of the Bills of Sale Act, 1878 (*l*), and do not require registration as a Bill of Sale (*m*). Marriage articles may be varied by other stipulations made before marriage (*n*); but it is doubtful if a settlement containing a covenant to settle after-acquired property can be superseded by a subsequent settlement though both are executed before marriage (*o*).

(*β*) *Post-nuptial Settlements where Valuable Consideration moves after Marriage.*—Post-nuptial agreements not made in pursuance of ante-nuptial articles, but for valuable consideration,

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(*e*) *Warden* v. *Jones*, 26 L. J. Ch. 427; 23 Beav. 487; affirmed 2 De G. & J. 76, overruling *Dundas* v. *Dutens*, 1 Ves. 196.
(*f*) *Cooper* v. *Wormald*, 27 B. 266; 7 W. R. 402.
(*g*) *Legg* v. *Goldwire*, Ca. t. Talb. 20.
(*h*) *Cordwell* v. *Mackrill*, 2 Ed. 344.
(*i*) *Re Holland, Gregg* v. *Holland*, [1902] 2 Ch. 360; 71 L. J. Ch. 518.
(*k*) *Barkworth* v. *Young*, 4 Drew. 1.
(*l*) 41 & 42 Vict. c. 31.
(*m*) *Wenman* v. *Lyon & Co.*, [1891] 2 Q. B. 192; 60 L. J. Q. B. 663.
(*n*) See *Legg* v. *Goldwire* (*ubi sup.*).
(*o*) *Re Gundry, Mills* v. *Gundry*, [1898] 2 Ch. 504; 67 L. J. Ch. 641.

are also binding and good. The consideration may move either from third parties, or from the husband, or the wife. If the father of the wife, or any third person, in consideration of the husband making a settlement, advance a sum of money, such a settlement will be good, and for valuable consideration (*p*), and in such a case the post-nuptial settlement will be binding upon the third person (*q*). A post-nuptial settlement has been held good against creditors by a third person agreeing to advance money to pay the debts of the husband on condition of his settling his property for the benefit of his family, though the latter concealed that he owed a particular debt, which was not satisfied in accordance with the agreement (*r*).

The consideration may also move from either husband or wife. A settlement was held good where a vested reversion was settled by the husband and wife on the wife for her separate use, the husband surrendering his right to receive the rents and profits during coverture (*s*); also, where the wife relinquished a valuable interest—her jointure—in consideration of a provision made by the husband (*t*). A post-nuptial settlement by one who was an infant at the time of his marriage, in pursuance of a promise to settle his estate when he became of age, was held good on proof of the settlement having been made in pursuance of the promise (*u*). Very slight consideration will support a post-nuptial settlement (*x*). A covenant in a post-nuptial settlement by a husband to settle on the wife after-acquired property, in order to avoid proceedings being taken against him for contempt of Court in marrying a ward of Court without leave, is enforceable (*y*). Under the Married Women's Property Act, 1882, the consideration moving from husband or wife must be of a valuable nature, mere relinquishment of rights or interests will no longer have any efficacy; for neither spouse has any real and enforceable right or interest in the other's property, but a *spes successionis*, or a mere expectation of an interest on survivorship, in the event of the deceased not having disposed of his or her property (*z*).

(*p*) *Wheeler* v. *Caryl*, Amb. 121; *Hance* v. *Harding*, 20 Q. B. D. 732.
(*q*) *Townend* v. *Toker*, L. R. 1 Ch. App. 446; 35 L. J. Ch. 608.
(*r*) *Holmes* v. *Penney*, 26 L. J. Ch. 179. See also *Pott* v. *Todhunter*, 2 Coll. 76.
(*s*) *Hewison* v. *Negus*, 16 Beav. 594; 22 L. J. Ch. 655.
(*t*) *Cottle* v. *Tripp*, 2 Vern. 220.
(*u*) *Lavender* v. *Blackstone*, 2 Lev. 146.
(*x*) See *Scott* v. *Bell*, 2 Lev. 70.
(*y*) *Stephens* v. *Green*, [1895] 2 Ch. 148; 64 L. J. Ch. 546.
(*z*) See *Shurmur* v. *Sedgwick*, 24 Ch. D. 597; 53 L. J. Ch. 87.

Voluntary Settlements. Voluntary settlements are those which are made after marriage, and not in pursuance of ante-nuptial articles, nor founded on valuable consideration. A post-nuptial settlement is not a marriage settlement in the proper sense of the term, though expressed to be in consideration of the marriage, but is merely voluntary, unless it rest upon some fresh consideration (*a*). Where ante-nuptial articles on which to base the subsequent settlement are wanting, it is the absence of the valuable consideration of marriage (for *ex vi termini* it has already taken place) which renders these settlements voluntary. A voluntary settlement is not altogether void, for it binds the settlor and all volunteers (that is, those whose interest is not founded on valuable consideration) claiming under or through him. A voluntary settlement of real estate is void as against purchasers for value, even though they had notice of the voluntary settlement (*b*). The settlor himself will not be assisted by the Court to defeat his settlement as against an unwilling purchaser (*c*), but he will be compelled to convey where the purchaser is willing to complete the bargain (*d*). So, too, a voluntary settlement of personal property is void as against creditors where it has been executed in fraud of them (*e*), or is void under the bankruptcy laws (*f*). But this subject will be more fully treated of in subsequent pages (*g*). Where a husband or a wife makes a post-nuptial settlement on the other, without any consideration moving from that other, though without any intent to defeat or defraud creditors, it will be held to be voluntary and void as against the latter.

How Voluntary Settlement may become Valid.—A voluntary settlement may become valid by subsequent dealing; thus, if a father make a voluntary settlement upon a child, who afterwards marries, the circumstance of the settlement leading to the marriage makes the settlement good, though it would have been bad as against creditors and subsequent purchasers if no marriage had taken place (*h*).

The Husband's Interest under the Settlement.—Without a

(*a*) Wats. Comp. Eq. 550.
(*b*) Law of Property Act, 1925, s. 173. *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84; *Buckle* v. *Mitchell*, 18 Ves. 100.
(*c*) *Smith* v. *Garland*, 2 Mer. 123.
(*d*) *Peters* v. *Nicolls*, L. R. 11 Eq. 391.
(*e*) 13 Eliz. c. 5.
(*f*) Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59, s. 42).
(*g*) See *post*, Revocation and Setting Aside of Settlements, p. 129.
(*h*) *Brown* v. *Carter*, 5 Ves. 862; see *Roddy* v. *Williams*, 3 Jo. & Lat. 18.

settlement the husband now takes no interest in his wife's property, at any rate during her life. When real estate of the husband is settled, he, almost as a matter of course, takes a life interest in it, without impeachment of waste, and usually, after intermediate limitations, sometimes to the wife for life, and the issue of the marriage, and sometimes to the issue only, he takes the ultimate remainder in default of issue. Frequently, also, he takes a life interest in his wife's real estate, subject to her prior life interest. With reference to personal property, or real estate directed to be converted and the proceeds invested, he usually takes the first life interest in his own property, and a life interest subject to her prior life interest in her property. Not infrequently there is a clause of forfeiture in the event of his becoming bankrupt, or assigning, charging, or encumbering his life interest. Without such a clause the husband's life interest, or any other interest which he may take under the settlement, will vest in his trustee in bankruptcy (*i*); but the validity of such a clause depends upon its surrounding circumstances (*k*). The trusts upon which such income is to be held in the event of the beneficiary doing any act by which he would be deprived of the right to receive the same are set out under the description of "Protective trusts" in section 33 of the Trustee Act, 1925 (*l*). This section does not apply to trusts coming into effect before January 1, 1926, and does not operate to validate any trust which is liable to be set aside.

An ante-nuptial settlement may operate to entitle the husband as purchaser to property of his wife which would not legally have fallen under this marital right (*m*). Where there is a gift to the wife for the purposes of the settlement, and the trusts of the settlement fail, the husband takes no interest in the gift, but there is a resulting trust for the benefit of the settlor (*n*).

Section 3.

Covenants in Settlements.

The subject-matter of this section will be treated of as follows: (1) Covenants or promises by third persons; (2) Cove-

(*i*) 4 & 5 Geo. V. c. 59.
(*k*) Wats. Comp. Eq. 577. For a further consideration of this subject, see next section, p. 111, and Revocation and Setting Aside of Settlements, *post*, p. 129.
(*l*) 15 Geo. V. c. 19.
(*m*) *Lanoy* v. *Duchess of Athol*, 2 Atk. 444.
(*n*) *Re Nash's Settlement*, 51 L. J. Ch. 511.

nants by the husband; (3) Covenants by the wife; (4) Covenants to settle after-acquired property.

Covenants by Third Persons.—Covenants or promises by third persons or strangers, based upon the consideration of marriage, are valid and can be enforced; the most common instance of covenants of this nature are those by parents, or persons *in loco parentis*, who covenant to make a settlement on the marriage of their children (*o*). If the promise or covenant is made after marriage, it is, of course, voluntary, the marriage consideration being wanting; but if made before the marriage, which takes place on the faith of it, that which was otherwise merely voluntary is converted into a promise based on valuable consideration (*p*). Where the covenantor, whether parent or person *in loco parentis*, does that which amounts to a substantial compliance with his covenant, the Court will deem him to have satisfied it (*q*), but where there are substantial differences between the provisions of the covenant and what purports to be the compliance therewith, the presumption is against his having satisfied his liability on the covenant (*r*). In such a case the parties interested are often put to their election as to whether they will abide by the covenant in the settlement or by the provision in the later instrument (*s*).

Covenants by Husband.—The husband may covenant to settle on his wife all or any part of his property, whether it exist at the time of the marriage or is to come into existence afterwards, or whether he be entitled in his own right or in that of his wife; and if the covenant has not been satisfied during his lifetime, the persons entitled under it may proceed against his estate for its due performance (*t*).

Covenants by Wife.—A wife is able to enter into like binding covenants for the settlement of her property on her husband, both that which she possesses at the date of the marriage and that which devolves upon her during coverture, except such as she may be restrained from anticipating, and if she fail to satisfy her covenant during her life, her estate may be proceeded against for the purpose of enforcing it (*u*).

(*o*) *Jones* v. *How*, 7 Ha. 267; 19 L. J. Ch. 324; see *Re Brookman's Trust*, L. R. 5 Ch. App. 182; 39 L. J. Ch. 138. (*p*) 1 Bish. Mar. Wom. s. 788.

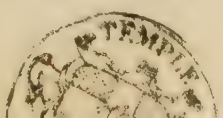
(*q*) *Lord Chichester* v. *Coventry*, L. R. 2 H. L. 71; *Mayd* v. *Field*, 3 Ch. D. 587; 45 L. J. Ch. 699.

(*r*) *Re Tussaud's Estate, Tussaud* v. *Tussaud*, 9 Ch. D. 363.

(*s*) *Russell* v. *St. Aubyn*, 21 Ch. D. 398; 46 L. J. Ch. 641.

(*t*) See *Smith* v. *Smith*, 1 Y. & C. Ex. 338.

(*u*) See *Re Parkin, Hill* v. *Schwarz*, [1892] 3 Ch. 510; 62 L. J. Ch. 55.



Covenants to Settle After-acquired Property.—Marriage settlements frequently contain an agreement and declaration, operating as a covenant on the part of the husband, to settle all the after-acquired property of the wife. Most of the cases which have been decided upon covenants of this description have arisen in the endeavour to adapt the covenant to the presumed intention of the parties. The great difficulty experienced is to determine the construction to be placed upon the language used, the Court having no authority to extend the language of the settlement beyond the fair construction of the words. In every case, therefore, the question is simply one of intention, which intention is to be collected from the terms of the instrument (*x*). The object of this covenant was to curtail the interest of the husband and protect the wife, whose property, coming to the husband *jure mariti*, was sought to be removed out of his control by impressing upon it the trusts of the settlement (*y*); and its operation has been on the whole more beneficial than the reverse. This agreement and declaration operating as a covenant is either made by the husband alone or by the husband and wife. If by the husband alone the wife was not bound by it (*z*), and it did not attach to her separate personal property, for her husband took no interest in it (*a*), nor to her real estate, for his interest in it was only a limited one (*b*), nor to reversionary interests not reduced into possession during the coverture (*c*). Thus, where in a settlement on the marriage of a female infant the husband covenanted with the trustees that if his wife, or himself in the right of his wife, became entitled to real or personal property above a certain amount, he would do everything to effect the vesting of the property in the trustees of the settlement, and property above the agreed amount was settled on the wife by her mother to her separate use, it was held by the Court of Appeal (reversing Fry, J.) that the wife was not bound to bring the property into settlement, as it was the husband's covenant alone (*d*). Where the husband and wife jointly agreed, or did that which amounted to a joint agreement, whether openly

(*x*) Peach. Sett. p. 523.
(*y*) See *Re Edwards*, L. R. 9 Ch. 97; 43 L. J. Ch. 265.
(*z*) *Young* v. *Smith*, L. R. 1 Eq. 180.
(*a*) *Ramsden* v. *Smith*, 2 Dr. 298; 23 L. J. Ch. 757; *Simson* v. *Jones*, 2 R. & M. 365, 376; *Re Macpherson, Macpherson* v. *Macpherson*, 55 L. J. Ch. 922.
(*b*) *Simson* v. *Jones* (*ubi sup.*).
(*c*) *Reid* v. *Kenrick*, 3 Eq. Rep. 1031; 24 L. J. Ch. 503.
(*d*) *Dawes* v. *Tredwell*, 18 Ch. D. 354; and see *Viditz* v. *O'Hagan*, [1900] 2 Ch. 87; 69 L. J. Ch. 507, as to a sum of money covered only by the husband's covenant to settle his wife's after-acquired property.

on the face of the document or by implication from its words, then the wife was bound (*e*), even as to her separate property (*f*), unless specifically excluded (*g*); she was likewise bound where she assented to the covenant (*h*); and the execution of the settlement deed is such assent (*i*). But where the settlement was post-nuptial, and there did not exist any ante-nuptial agreement binding on the wife, she was not bound by her husband's covenant to settle (*k*). The effect of this joint covenant by husband and wife operated to sever the wife's joint interest in personal estate to which she became entitled by a subsequent instrument (*l*).

An ante-nuptial agreement by husband and wife for the settlement by husband and wife of the latter's after-acquired property is a covenant by the wife as well as by the husband, whether she be a minor or of full age. If the wife be a minor, however, the Married Women's Property Act, 1907, provides that a settlement or agreement for a settlement made after December 31, 1907, shall not be valid unless it is confirmed by her after she attains full age. If she die an infant any property of hers to which her husband becomes entitled on her death is bound. If, being a minor, a sum of money is settled on the wife, the income of which she is restrained from anticipating, and by the same instrument she covenants to bring after-acquired property into the settlement, she cannot be compelled to elect whether she shall give up the income of the settled fund or bring the after-acquired property into the settlement, but she is entitled to keep both (*m*). To make such a covenant absolutely binding upon a female infant, the consent of the Court of Chancery, if she be over seventeen years of age, must be first obtained to the settlement under the Infants' Settlement Act, 1855 (*n*). If an infant with an English domicil enter into such

(*e*) *Butcher* v. *Butcher*, 14 Beav. 222; *Hammond* v. *Hammond*, 19 Beav. 29; *Re D'Estampes' Settlement*, 53 L. J. Ch. 1117. Where there is any ambiguity in the body of the deed the Court is entitled to look at the recitals for information as to what was agreed upon by the parties to the intended marriage. *Re De Ros' Trust, Hardwicke* v. *Wilmot*, 31 Ch. D. 81; 55 L. J. Ch. 73.

(*f*) *Milford* v. *Peile*, 2 W. R. 181.

(*g*) *Coventry* v. *Coventry*, 32 Beav. 612; *Kane* v. *Kane*, 16 Ch. D. 207; 50 L. J. Ch. 72; *Re Berens Settlement Trusts, Berens* v. *Benyon*, 59 L. T. 626.

(*h*) *Lee* v. *Lee*, 4 Ch. D. 175; 46 L. J. Ch. 81.

(*i*) *Re Haden, Coling* v. *Haden*, [1898] 2 Ch. 220; 67 L. J. Ch. 428.

(*k*) But see *Anderson* v. *Abbott*, 23 Beav. 457.

(*l*) *Re Hewett, Hewett* v. *Hallett*, [1894] 1 Ch. 362; 63 L. J. Ch. 182.

(*m*) *Re Vardon's Trusts*, 31 Ch. D. 275; 55 L. J. Ch. 259. This decision overrules *Re Queade's Trusts*, 54 L. J. Ch. 786, and *Willoughby* v. *Middleton*, 2 J. & H. 344, on this point. See *Codrington* v. *Lindsay*, 8 Ch. App. 578; 42 L. J. Ch. 526; *Smith* v. *Lucas*, 18 Ch. D. 531; and *Cahill* v. *Cahill*, 8 App. Cas. 420, 427.

(*n*) The consent of the Court to a post-nuptial settlement by an infant married

a covenant, and then marry a foreigner, by the law of whose domicil she is prevented from making such a covenant so as to be irrevocable, the mere fact that she does not disaffirm the covenant within a reasonable time after attaining majority is not to be treated by the English Courts as an affirmance of it (*o*).

There is a difference between a post-nuptial and an ante-nuptial covenant, made by a woman solely, to settle her after-acquired property so far as affects those who were married under the old law. Such a post-nuptial covenant was ineffectual to bind subsequently acquired property, for her contract only bound her property existing at its date. If, then, the covenant had been made by an infant, and after attaining majority she affirmed it, she would only bind that property to which she was entitled at the date of the confirmation (*p*). But since the Married Women's Property Act, 1882, such post-nuptial covenant would be binding upon her generally, for her contract will now bind subsequently acquired property (*q*).

The wife's covenant to settle after-acquired property may be limited in its operation, either by direct words or by implication from the general tenor and effect of the instrument in which she covenants (*r*). A woman on marriage may covenant to bring into settlement all property which shall come to her other than that settled to her separate use, and if property settled to her separate use does come to her during coverture, the property will not be bound by her covenant (*s*); or she may covenant in one part of the instrument in wide and broad terms to settle her after-acquired property, but in another part use expressions from which it may be inferred that the operation of her covenant is to be limited in its effect to property of a particular nature and description (*t*). If the wife covenants to settle after-acquired property, the covenant will cover property given by her husband during the coverture (*u*), but the trustees are under no obligation to enforce such a covenant against volunteers (*x*). A covenant

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woman has been given under this Act, see *Sampson* v. *Wall*, 25 Ch. D. 482; 53 L. J. Ch. 457.

(*o*) *Viditz* v. *O'Hagan*, [1900] 2 Ch. 87; 69 L. J. Ch. 507.

(*p*) See *Re Vardon's Trusts*, 31 Ch. D. 275; 55 L. J. Ch. 259.

(*q*) See *post*, p. 106.

(*r*) See *Re Stephenson*, 3 De G. M. & G. 969.

(*s*) See *Brooks* v. *Keith*, 1 Dr. & Sm. 462; *Coventry* v. *Coventry*, 9 Jur. (N.S.) 313.

(*t*) *Re Mainwaring's Settlement*, L. R. 2 Eq. 487.

(*u*) *Re Ellis' Settlement*, *Ellis* v. *Ellis*, [1909] 1 Ch. 618; *Re Plumptre's Marriage Settlement*, *Underhill* v. *Plumptre*, [1910] 1 Ch. 609.

(*x*) *Re Hewett*, *Hewett* v. *Eldridge*, 49 L. J. 10; *Re Pryce*, *Neville* v. *Pryce*, 86 L. J. Ch. 383.

by an intended wife to settle her after-acquired property is not a "usual" clause in a marriage settlement, and it should not be inserted in the absence of express agreement (*y*).

It is now a rule of construction that where the after-acquired property is found not to fit the trusts of the settlement, it may be assumed that such property was not intended to come within the covenant to settle (*z*). Where a covenant has been entered into for the settlement of the future property of a married woman, and a gift is afterwards made to her of such a nature as to come within the terms of the covenant, no expression of the intention of the donor that it shall not be settled will exclude it from the operation of the covenant (*a*). The only case where the wife's covenant would not operate would be that of a gift which she was restrained from alienating, and would forfeit if she did aliene; and her assignment to the trustees of her settlement would amount to such alienation, and so create a forfeiture (*b*).

The Married Women's Property Act, 1882, has much modified the law on this subject, and the covenant by the husband, which was framed for the protection of the wife's property and to exclude the marital right, would seem, since the Act came into force, to be not only unnecessary but actually nugatory. The covenant by the wife will be retained only in cases where it is desired to restrain her from in any way anticipating or alienating her property, except by way of assignment to her trustees. So far as her husband is concerned, a married woman is mistress of any property which may come to her during coverture, and unless she has entered into a covenant to settle property coming to her during marriage, she can dispose of it as she pleases, unless restrained by the terms of the instrument through which she acquires it. The husband, therefore, in future settlements, need not enter into any covenant in the matter, for he has no more power over his wife's property than she has over his. The practical effect of this covenant is to withdraw the

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(*y*) See *Re Maddy, Maddy* v. *Maddy*, [1901] 2 Ch. 820.

(*z*) So far as the above canon is the basis of the decision of *Re Mainwaring's Settlement*, that case may be taken to be good law; but if the language of the learned judge who decided it goes to the extent that the intention of a subsequent donor of property to a married woman can operate upon it contrary to the trusts of the settlement, then it cannot be supported. *Re Allnutt, Pott* v. *Brassey*, 22 Ch. D. 275; 52 L. J. Ch. 299; *Scholfield* v. *Spooner*, 26 Ch. D. 94; 53 L. J. Ch. 777; *Re Mackenzie, Mackenzie* v. *Edwards-Moss*, [1911] 1 Ch. 578; 80 L. J. Ch. 443; *Re Capel, Arbuthnot* v. *Capel*, [1914] W. N. 452.

(*a*) *Re Allnutt, Pott* v. *Brassey* (*ubi sup.*); *Scholfield* v. *Spooner* (*ubi sup.*).

(*b*) See *Brooks* v. *Keith* (*ubi sup.*).

wife's property from the control of her future creditors. As a married woman is mistress of her property when unrestrained, the morality of this provision is questionable. If the wife intends to bring into settlement property to which she may become subsequently entitled, it would seem that she alone need covenant with the trustees or other parties to that effect (*c*); but it was held before the Act of 1907 that if a husband covenant with the trustees of his marriage settlement to settle the property of his intended wife, which has not originally been settled by deed or will to her separate use, and she agrees to such settlement, even though she was an infant at the time of the marriage, yet the husband's covenant binds her (*d*).

Where a woman married before this Act came into force has covenanted to bring into settlement after-acquired property not limited to her separate use, and acquires by deed or will after the commencement of the Act any such property which, by the terms of the instrument of donation, *is not limited to her separate use*, she is bound by her covenant to bring it into settlement, on the ground that, though section 5 of the Act attaches to such property the statutory separate use, yet section 19 limits the operation of section 5 by preventing the provisions of marriage settlements being interfered with or affected by withdrawing that which, independently of the Act, must have been brought into settlement (*e*). But where a woman has so covenanted, but the after-acquired property coming to her is limited to her separate use *without power of anticipation*, in such case the property so limited is not bound by her covenant (*f*). Where a woman married before January 1, 1883, had a fund settled upon her with an absolute reversion in the property so settled, with a power to appoint the same by will, or, when discovert, by deed, and she became discovert, but did not exercise the power, but married again since January 1, 1883, but without a settlement, she was held entitled to have the fund transferred to her without a release, because, as section 2 of the Act had

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(*c*) *Stevens* v. *Trevor-Garrick*, [1893] 2 Ch. 307; 62 L. J. Ch. 660.

(*d*) *Buckland* v. *Buckland*, [1900] 2 Ch. 534; 69 L. J. Ch. 648, following *Stevens* v. *Trevor-Garrick* (*ubi sup.*). See Married Women's Property Act, 1907 (7 Edw. VII. c. 18), which provides that no settlement unless made before 1st January, 1908, by a husband, or intended husband, respecting the property of any woman he may marry or have married, is valid unless being of full age she executes the settlement, or confirms it after she attains full age.

(*e*) *Re Stonor's Trusts*, 24 Ch. D. 195; 52 L. J. Ch. 776; *Re Whitaker*, *Christian* v. *Whitaker*, 34 Ch. D. 227; 56 L. J. Ch. 251; *Hancock* v. *Hancock*, 38 Ch. D. 78; 57 L. J. Ch. 396, disapproving of *Re Queade's Trusts*, 54 L. J. Ch. 786.

(*f*) *Re Currey*, *Gibson* v. *Way*, 32 Ch. D. 361; 55 L. J. Ch. 906.

added the incident of separate use, section 19 did not exclude its general operation (*g*).

This covenant *prima facie* lasts only "during coverture," so that any property coming to a woman when discovert is not affected by it; thus the effect of a decree of judicial separation is to render inoperative a covenant by a woman to settle after-acquired property, and she takes all property coming to her while the decree is in force as a *feme sole* (*h*); but, on the other hand, to prevent the *jus maritale* attaching to the wife's property, it has been held that a surviving husband is bound by his covenant to bring into settlement his wife's reversionary property that did not fall into possession during her lifetime (*i*). But this construction has been limited to where the property is in a reversionary state (*k*). The effect of section 8 of the Matrimonial Causes Act, 1858 (*l*), is that all property, whether in possession or reversion, coming to a married woman after a decree of judicial separation comes to her as if she were a *feme sole*, and this is so even where she has entered into a covenant to settle her after-acquired property (*m*). But a distinction is to be drawn between reversionary property which is in existence at the date of the settlement and affected by the covenant, and property her title to which accrues after the decree of separation (*n*).

The property capable of being settled in this manner is property coming to a married woman, if it be an absolute interest, and not merely for life (*o*), which vests in, devolves upon, or belongs to her, or over which she can exercise a general power of appointment if so covenanted by her (*p*). The covenant does not attach, where the power of appointment is general, until the power is so exercised as to make the property subject

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(*g*) *Re Onslow, Plowden* v. *Gayford*, 39 Ch. D. 622; 57 L. J. Ch. 940.

(*h*) *Dawes* v. *Creyke*, 30 Ch. D. 500; 54 L. J. Ch. 1096.

(*i*) *Fisher* v. *Shirley*, 43 Ch. D. 290; 59 L. J. Ch. 29; *Re Dowding's Settlement Trusts, Gregory* v. *Dowding*, [1904] 1 Ch. 441; 73 L. J. Ch. 194.

(*k*) See *Re Bankes, Reynolds* v. *Ellis*, [1902] 2 Ch. 333; 71 L. J. Ch. 708. See *post*, chap. XIII.

(*l*) 21 & 22 Vict. c. 108.

(*m*) *Dawes* v. *Creyke* (*ubi sup.*); *Davenport* v. *Marshall*, [1902] 1 Ch. 82; 71 L. J. Ch. 29, where *Re Bankes, Reynolds* v. *Ellis* (*ubi sup.*), was distinguished on the ground that the separation order was by an Italian Court, and did not put the wife in the position of a *feme sole*.

(*n*) *Davenport* v. *Marshall* (*ubi sup.*).

(*o*) *Townshend* v. *Harrowby*, 4 Jur. (N.S.) 353; 27 L. J. Ch. 553.

(*p*) *White* v. *Briggs*, 22 Beav. 176, *n.* £200 is as a rule the smallest amount of personalty so settled, but £500 is the usual limit; see *Re Mackenzie's Settlement*, L. R. 2 Ch. App. 345; 36 L. J. Ch. 320, for the mode of ascertaining the value of the wife's interest.

to the covenant (*q*). The same rule applies where the gift is on such trusts as the donee may appoint with a gift over in favour of the covenantor on default of appointment: though on this point different views have been taken (*r*). A life interest, however, may be affected by the covenant, if apt words are used showing that it is intended to be so affected (*s*). A mere *spes successionis* to a share of her husband's property, though coupled with an indemnity by him against disappointment, is not "property" within this covenant, for it never vests in the wife during coverture (*t*).

It is usual to exclude from the operation of the covenant such things as jewels, furniture and personal chattels, but this must be done by express words, and will not be implied (*u*).

A covenant by a wife or a husband and wife on marriage to settle her after-acquired real estate does not affect an estate tail, because of the peculiar nature of such an estate (*x*).

The duration of these covenants, in the absence of expressions to the contrary, is "during coverture": and where that expression has been omitted, the duration has been restricted to that period (*y*); and this was so where the property was derived from a specified source (*z*). The ordinary clause is now drawn to

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(*q*) *Stuart* v. *Stuart*, [1897] 2 Ch. 583; *Bayer* v. *Sewell*, [1918] W. N. 379; 87 L. J. Ch. 194.

(*r*) In *Re Gerard, Oliphant* v. *Gerard*, 38 L. T. 800, North, J., held that the covenant did not attach, and that the power could be exercised to defeat it. In *Re O'Connell, Mayo* v. *Joyce*, [1906] 2 Ch. 574; 75 L. J. Ch. 796; Kekewich, J., relying on *Stewart* v. *Pemberton*, 1897, W. N. 26, took the contrary view, but in *Trimmer* v. *Bayliffe*, [1908] 1 Ch. 682; Eve, J., followed *Campbell* v. *Harraway*, *ubi sup.*, distinguishing *Stewart* v. *Pemberton*, *ubi sup.*, and disapproving *Re Kekewich*, J., and *Scarisbrick*, J., in *French* v. *Elder*, 1903, W. N. 137, followed Eve, J. Under what circumstances a married woman who has covenanted to bring into her settlement all money over a particular amount is not bound by or may defeat the effect of her covenant, see *Re Whittaker*, [1918] W. N. 107; *Re Davies, Harrison* v. *Davies*, [1918] 2 Ch. 304; 87 L. J. Ch. 602. A legacy within the covenant not released by anyone of legacy duty is not a payment not within the covenant, is not affected by the covenant. *Re Pares, Scott-Chui* v. *Pares*, [1901] 1 Ch. 708; 70 L. J. Ch. 426. A legacy out of general estate given by one codicil, and a legacy out of proceeds of sale of real estate given by another codicil, are received at one and the same time, and their value is to be aggregated to ascertain whether they are within the covenant or no. *Re Pares, Scott-Chui* v. *Pares* (*ubi sup.*).

(*s*) See *Re Pinchley's Settlement*, [1900] 1 Ch. 1; *Bingley* v. *Bingley*, [1897] 1 Ch. 311.

(*t*) *Re Simpson, Simpson* v. *Simpson*, [1904] 1 Ch. 1; 73 L. J. Ch. 58; *Re Mudge*, [1914] 1 Ch. 115; 83 L. J. Ch. 243.

(*u*) *Wainwright* v. *Miskelyne*, [1917] W. N. 346; and see also *Hammond* v. *Dodgson*, [1917] 1 Ch. 60; 86 L. J. Ch. 7.

(*x*) *Holmes* v. *Parkinson*, [1891] 65 Ch. D. 190; 59 L. J. Ch. 196; *Re Dunning's Settlement*, [1916] 1 Ch. 178, C. A.; 75 L. J. Ch. 90; *Re Pearse's Settlement*, *Pearse* v. *Pearse*, [1909] 1 Ch. 304; 78 L. J. Ch. 73.

(*y*) *Re Edwards*, L. R. 9 Ch. App. 97; S. C. 43 L. J. Ch. 207; *Re Hellihan, Broughton* v. *Broughton*, [1894] 3 Ch. 76; 63 L. J. Ch. 677. As to covenants on marriage of after-acquired property is now governed by the rules laid down in *Re Edwards*: see *Holloway* v. *Holloway*, 25 W. R. 475.

(*z*) *Re Campbell*, 6 Ch. D. 686; 46 L. J. Ch. 142.

include every interest of the wife existing at the time of the marriage or acquired during the coverture, whether in possession or in reversion, and whether vested or contingent. A reversionary interest in a legacy in default of appointment which vested in the wife during the coverture, though liable to be divested by the exercise of a power of appointment, was held to be property within such a covenant (*a*). If the clause is confined to property in existence at the date of the settlement, a new interest acquired by the wife subsequently to that date will not be bound by the covenant (*b*). A clause so drafted obviates any speculation which used to attach to the words of futurity "should become entitled," and kindred expressions. As already stated, this subject has lost much of its importance, but as it is possible that some clauses may not have been so drafted as to avoid doubts, it may not be without advantage to note shortly how unsettled the opinions of the judges have been on this subject, and to what conclusion the balance of opinion tends.

In *Grafftey* v. *Humpage* (*c*), *James* v. *Durant* (*d*), *Re Hughes' Trusts* (*e*), and the later case of *Re Viant's Trusts* (*f*), it was held that the words of futurity were satisfied by the circumstance that the husband's marital right accrued upon the marriage, so as to bring property belonging to the wife at the date of the settlement within the operation of the covenant. But this doctrine has been expressly disapproved in *Archer* v. *Kelly* (*g*), *Re Browne's Will* (*h*), *Re Pedder's Trusts* (*i*), and *Re Jones' Will* (*k*), which virtually overrules *Re Viant's Trusts*, which case can no longer be considered law; and property belonging to the wife at the date of the marriage will not be brought into settlement as future acquired property on the ground merely that her title to it is only declared by the Court at a later period (*l*). It is almost needless to observe that this point cannot be debated where the husband dies in the lifetime of the wife and before the fund falls into possession, or where

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(*a*) *Re Ware, Cumberledge* v. *Cumberledge-Ware*, 45 Ch. D. 269; 59 L. J. Ch. 717.
(*b*) See *Sweetapple* v. *Horlock*, 11 Ch. D. 745; 48 L. J. Ch. 660.
(*c*) 1 Beav. &c., 46; 8 L. J. Ch. 98.
(*d*) 2 Beav. 177; 9 L. J. Ch. 85. (*e*) 4 Giff. 432.
(*f*) L. R. 18 Eq. 436; 43 L. J. Ch. 832.
(*g*) 1 Dr. & S. 300; 29 L. J. Ch. 911.
(*h*) L. R. 7 Eq. 231; 38 L. J. Ch. 316.
(*i*) L. R. 10 Eq. 585; 40 L. J. Ch. 77.
(*k*) 2 Ch. D. 362; 45 L. J. Ch. 428.
(*l*) *Re Garnett, Robinson* v. *Gandy*, 33 Ch. D. 300; 55 L. J. Ch. 773; and see *Williams* v. *Mercier*, 10 App. Cas. 1; 54 L. J. Q. B. 148.

the wife dies before it falls into possession (*m*). It has been held that income not originally included in the covenant might be so invested as to indicate a permanent intention on the part of the owner to turn it into capital, in which case it would become subject to the covenant, if its terms are capable of including it (*n*). But in more recent cases it has been decided that, unless it appears clearly intended that the income derived by a married woman from her settled property shall be within the terms of such a covenant, any investments made by her, during coverture, of the proceeds of such income do not become subject to the covenant (*o*).

Words of futurity in the covenant clearly exclude property existing at the time of making the covenant (*p*).

Reversionary or Contingent Interests.—The foregoing remarks deal with property already in possession. With reference to reversionary or contingent interests, it may (with caution where so much must in each individual case depend on the terms of the instrument) be stated that, if falling into possession during the coverture, they will be considered as after-acquired property within the meaning of a covenant for the settlement of such property, but that they would not be affected by the covenant where they did not accrue during the coverture, whether the wife were or were not a party to it (*q*).

A contingent or reversionary interest of the wife, existing at the date of the marriage, which falls into possession during coverture, would fall within the operation of a covenant to settle all property of whatsoever kind to which she became entitled during the coverture, unless there were words in the covenant to cut down its effect (*r*); and such a reversionary interest vested in the wife at the date of marriage is within the covenant, though it is liable to be divested by the exercise of a power of appointment (*s*).

(*m*) *Re Mitchell*, 9 Ch. D. 5; 47 L. J. Ch. 12; overruling 6 Ch. D. 618.

(*n*) *Re Bendy, Wallis* v. *Bendy*, [1895] 1 Ch. 109; 64 L. J. Ch. 170.

(*o*) *Finlay* v. *Darling*, [1897] 1 Ch. 719; 66 L. J. Ch. 348; *Re Clutterbuck's Settlement, Bloxam* v. *Clutterbuck*, [1905] 1 Ch. 200; 73 L. J. Ch. 698. In these cases *Re Bendy* (*ubi sup.*) was not followed. The cases of *Finlay* v. *Darling* (*ubi sup.*) and *Re Clutterbuck's Settlement* (*ubi sup.*) have been recently approved of by the House of Lords on an appeal from Scotland. See *Mackenzie* v. *Allardes*, [1905] A. C. 285, 296.

(*p*) *Re Clinton's Trusts*, L. R. 13 Eq. 295; 45 L. J. Ch. 191; *Re Pedder's Trusts* (*ubi sup.*).

(*q*) Dav. Prec. vol. ii. Pt. I. p. 211; *Re Welstead, Welstead* v. *Leeds*, 47 L. T. 331.

(*r*) *Re Mackenzie's Settlement Trusts*, L. R. 2 Ch. App. 345; 36 L. J. Ch. 320.

(*s*) *Re Jackson's Will*, 13 Ch. D. 189; 49 L. J. Ch. 82; *Sweetapple* v. *Horlock*, 11 Ch. D. 745; 48 L. J. Ch. 660, corrected by *Re Jackson's Will* (*ubi sup.*).

In *Re Clinton's Trusts* (*t*) it was held that the words frequently used in the covenants under discussion, "become entitled to," may mean an acquisition of property in which the wife had no interest at the time of marriage, but which vests in her absolutely during the coverture, and would include a reversionary interest which fell into possession during coverture; but in a recent case (*u*) the same words were held not to include property to which the wife was entitled in reversion at the date of the marriage, even though it might fall into possession during the coverture.

To sum up, the property (whether in possession or reversion) included in the operation of the covenant as ordinarily drawn, will be such as is comprised in its terms, and acquired by the wife during coverture, while that will be excluded which, though within its terms, is not acquired while the coverture lasts.

Not only are such covenants as these entered into with respect to the wife's property, but sometimes there is an agreement or covenant by the husband to settle his own after-acquired property. A general assignment of property is rightly regarded with suspicion, and a covenant to assign to trustees all future property acquired by the settlor during coverture comes within the mischief of the statute, and is void against the trustee in bankruptcy (*x*), but the marriage consideration is so strong that a covenant of this nature made by an insolvent, but without the appearance of fraud, was upheld against his assignees in bankruptcy (*y*). A covenant on marriage by a man to settle his after-acquired property, excepting his business assets, is good, and may be enforced; and a post-nuptial assignment of chattels in pursuance of such covenant is not a bill of sale requiring registration, but a marriage settlement within the exception in section 4 of the Bills of Sale Act, 1878 (*z*).

Bankruptcy.—But there are circumstances under which the

(*t*) Per Wickens, V.-C. (*ubi sup.*).

(*u*) Per Kekewich, J., *In re Bland's Settlement, Bland* v. *Perkin*, [1905] 1 Ch. 4; 74 L. J. Ch. 28. His Lordship held that the words "become entitled" were words of futurity and excluded property in existence at the date of the marriage. Followed in *Re Yardley's Settlement, Milward* v. *Yardley* (1908), 124 L. T. Jo. 315, where the words were held to mean become entitled in interest and not in possession. See also *Re Capel's Trusts, Arbuthnot* v. *Galloway* (1914), W. N. 378; 49 L. J. N. C. 587.

(*x*) *Ex parte Bolland, Re Clint*, L. R. 17 Eq. 115; 43 L. J. Bkcy. 16. But see *Bishop, Re Tonnies*, L. R. 8 Ch. App. 718; *Re Andrews*, 7 Ch. D. 635; 42 L. J. Q. B. 99.

(*y*) *Hardey* v. *Green*, 12 Beav. 182; 18 L. J. Ch. 480.

(*z*) *Re Reis, Ex parte Clough*, [1904] 2 K. B. 769; 73 L. J. K. B. 929; affirmed *sub nom. Clough* v. *Samuel*, [1905] A. C. 442.

assignment by the husband would not operate as a valid conveyance to defeat the claims of his creditors, and the Bankruptcy Act, 1914, provides for this contingency. Section 47 (2) of the Act of 1883 was amended by the Bankruptcy and Deeds of Arrangement Act, 1913 (3 & 4 Geo. V. c. 34), s. 13 (2), and has now been reproduced in the Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 42 (2), which enacts that "any covenant or contract made by any person (hereinafter called the settlor) in consideration of his or her marriage, either for the future payment of money for the benefit of the settlor's wife or husband, or children, or for the future settlement on or for the settlor's wife or husband or children, of property, wherein the settlor had not at the date of the marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property in right of the settlor's wife or husband, shall, if the settlor is adjudged bankrupt and the covenant or contract has not been executed at the date of the commencement of his bankruptcy, be void against the trustee in the bankruptcy, except so far as it enables the persons entitled under the covenant or contract to claim for dividend in the settlor's bankruptcy under or in respect of the covenant or contract, but any such claim to dividend shall be postponed until all claims of the other creditors for valuable consideration in money or money's worth have been satisfied." "'Settlement' shall for the purposes of this section, include any conveyance or transfer of property." It would appear that the principal alteration is to give those claiming under the settlement the rights only of deferred creditors (*e*). The question may be raised whether, if a husband who has entered into a covenant to settle his after-acquired property becomes bankrupt and obtains his discharge, he is free from his liability on the covenant. His liability will, in all probability, be deemed to continue; for though in the case of other creditors it would be a provable matter, and so barred by the discharge, yet matrimonial relations are different from ordinary business transactions, and the interests of the children would be taken into consideration (*b*).

The property which comes to the husband (*c*), whether in possession or reversion, and whether settled on him by the wife

(*a*) *Dent, In re, Ex parte The Trustee*, [1923] 1 Ch. 113; 92 L. J. Ch. 106.
(*b*) See *Collyer* v. *Isaacs*, 19 Ch. D. 342, 352; 51 L. J. Ch. 14, distinguished *Lind, In re, Industrials Finance Syndicate, Lim.* v. *Lind* [1915] 2 Ch. 345; 84 L. J. Ch. 884.
(*c*) *Sharpe* v. *Cosserat*, 3 W. R. 473.

or derived from other adventitious sources, may be so settled on him as to divest on his bankruptcy or insolvency, but the settlement must be so framed as to make the divesting absolute for a limited estate (*d*). The form of trusts described as "protective trusts" are set out in section 33 of the Trustee Act, 1925, but this section does not operate to validate trusts liable to be set aside. Though to an absolute gift of property to a man or a *feme sole* it is not possible to attach a clause of forfeiture and a gift over if the donee alienates or assigns the property, as such would be inconsistent with the terms of the gift, yet where the gift is for a limited estate then such divesting clause becomes operative. A man may settle property upon himself for life with a clause forfeiting his interest in the event of alienation or attempted alienation, provided such alienation affects only a particular alienee; thus, where real estate was settled upon trust to pay the rents to the settlor for life, or until he should encumber it, or become bankrupt, and then to pay an annuity to his wife, and he first mortgaged the property, and then became bankrupt, the limitation was upheld, as the forfeiture arose upon the mortgage (*e*); and where the settlor settled his own property on trust to pay the income to himself during his life or till he should become bankrupt or suffer something whereby the same would, through his act, default, or by operation or process of law, if belonging absolutely to him become vested in or payable to some other person or persons, the limitation over was upheld in an involuntary alienation of the husband's income in favour of a judgment creditor, who had obtained an order appointing a receiver of such income (*f*). But a man cannot settle his property in such a way as to divest on his bankruptcy, as this would be a fraud on the bankruptcy law (*g*); and where a husband covenanted in his settlement to pay a sum of money in the event only of his failing in his circumstances, his trustees were not allowed to prove as creditors in his bankruptcy (*h*).

A husband by a mere post-nuptial settlement, unless in

(*d*) See *Lockyer* v. *Savage*, 2 Str. 947; *Whitmore* v. *Mason*, 2 J. & H. 214; *Montefiore* v. *Behrens*, L. R. 1 Eq. 171 (post-nuptial settlement); *Re Akeroyd's Settlement, Roberts* v. *Akeroyd*, [1893] 3 Ch. 363; 63 L. J. Ch. 32; *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505; 64 L. J. Ch. 274; *Re Perkins' Settlement Trusts, Leicester Warren* v. *Perkins* (1912), W. N. 99.

(*e*) *Brooke* v. *Pearson*, 27 Beav. 181; see also *Knight* v. *Browne*, 30 L. J. Ch. 649; and compare *Doherty* v. *Power*, [1916] 1 Ir. R. 337.

(*f*) *Re Detmold, Detmold* v. *Detmold*, 40 Ch. D. 585; 58 L. J. Ch. 495.

(*g*) *Higinbotham* v. *Holme*, 19 Ves. 88; *Ex parte Hodgson*, 19 Ves. 206; *Lester* v. *Garland*, 5 Sim. 205; *Re Brewer's Settlement, Morton* v. *Blackmore*, [1896] 2 Ch. 503; 65 L. J. Ch. 821; and see *Merry* v. *Pownall*, [1898] 1 Ch. 306; 67 L. J. Ch. 162.

(*h*) *Ex parte Murphy*, 1 Sch. & Lef. 44.

pursuance of an agreement to settle made antecedently to the marriage, cannot so settle his wife's reversionary estate to which he might become entitled that his life interest in such fund, when fallen into possession, should become determinable on his bankruptcy; for if he does become bankrupt, such settlement is void against his trustee in bankruptcy under 13 Eliz. c. 5 (*i*), the provisions of which statute are now replaced by sections 172 and 173 of the Law of Property Act, 1925.

But a settlement of damages obtained by the settlor in a divorce suit sanctioned by the Divorce Court cannot be set aside as voluntary, or as made with intent to defeat creditors, though at the time of the settlement he was in financial difficulties (*k*).

In like manner, a married woman is not permitted by bringing property, or by covenanting to bring it, into settlement with a restraint on anticipation (which would have the same effect as the divesting of the husband's property), to withdraw the means of satisfying the claims of her ante-nuptial creditors, and if she is in trade her post-nuptial creditors as well (*l*). The claims of her ante-nuptial creditors have been recognized for some time in cases where the woman indebted at the time of her marriage has settled property to her separate use without power of anticipation, and her ante-nuptial debts have been made a charge upon such property (*m*). This principle has now received legislative sanction (*n*).

SECTION 4.

Construction of Settlements.

This section will be divided into two sub-sections—(1) The construction of marriage articles; (2) The construction of settlements generally.

(*i*) *Re Holland, Gregg* v. *Holland*, [1902] 2 Ch. 360; 71 L. J. Ch. 518.

(*k*) *Re Stephenson, Ex parte Brown* v. *Stephenson and others*, 45 W. R. 416.

(*l*) *Ex parte Bolland, Re Clint*, L. R. 17 Eq. 115; 43 L. J. Bkcy. 16.

(*m*) *Sanger* v. *Sanger*, L. R. 11 Eq. 470; 40 L. J. Ch. 372; see *post*, chap. XIII. Separate Estate.

(*n*) 45 & 46 Vict. c. 75, s. 19. But if a married woman, solvent at the time of her marriage, and not a trader, makes a settlement whereby she deprives herself of the power of anticipation, and covenants to bring into settlement all after-acquired property, and contracts debts, and subsequently becomes entitled to property, the claims of her trustees to such property will be held superior to those of her post-nuptial creditors, as sect. 19 of the above Act leaves untouched the effect of restraint upon anticipation so far as debts contracted after marriage are concerned. See *Hemingway* v. *Braithwaite*, 61 L. T. 224. In this case, a woman while an infant married and contracted a debt, for which judgment was recovered against her separate estate. On attaining her majority, she executed a post-nuptial settlement, by which she restrained herself from anticipating her property; and it was held that the settlement was good against her creditors by virtue of sect. 19 of the above Act.

Construction of Marriage Articles.—The guide for the construction of marriage articles is the presumed intention of the parties who have executed them. Articles duly signed, not followed by any settlement, form a binding contract, capable of being enforced at the instance of any person who would have been entitled to enforce any claim under the settlement, had such settlement been made in pursuance of the articles. They will be specifically enforced, the form of the articles being immaterial, and the insertion of penalties in a bond does not exclude the jurisdiction of equity (*o*). Sometimes in marriage articles trusts are inserted which are in their nature *executory*—*i.e.*, where they remain to be carried out in the future; and these will be carried out according to the presumed intention of the parties, but in a careful and accurate manner (*p*). But if the trusts are *executed*, they will be construed strictly according to their legal limitations (*q*); and as a result of this principle the Courts of Equity have decreed strict settlements, as giving most effect to the presumed intentions of the parties to provide for the issue of the marriage; but this does not hold good in all cases (*r*). The intentions of the parties, as expressed in the articles, ought for safety to be embodied in the more formal settlement. But under certain circumstances, as where the proportions of the property are slender, in order to avoid expense, the Court will declare the true meaning of the articles without causing a formal instrument to be prepared and executed (*s*).

Construction of Settlements.—In construing settlements the Court will look as closely as it can to the intention of the parties; and though bound to give effect to clear and positive limitations, will allow the language of the instrument, when feasible, to be controlled by its general intention (*t*). The plain meaning of the words must have effect given to them, unless they are clearly inconsistent with the general drift and intention of the docu-

(*o*) *Chilliner* v. *Chilliner*, 2 Ves. sen. 528; *Prebble* v. *Boghurst*, 1 Swanst. 309.
(*p*) *Trevor* v. *Trevor*, 1 P. Wms. 622.
(*q*) *Jervoise* v. *Duke of Northumberland*, 1 Jac. & W. 559.
(*r*) See *Howel* v. *Howel*, 2 Ves. sen. 358.
(*s*) *Byam* v. *Byam*, 19 Beav. 58; 24 L. J. Ch. 209. Where articles directing the settlement of personal property have not been carried out and executed in a more formal manner, the court will take upon itself to direct a settlement of the property; thus, where articles direct personal property to be settled upon trust for the husband "during their lives," they will be carried into effect by giving the wife the first life interest. For the mode of settling a wife's fortune which is usually approved by the Court of Chancery, see *Cogan* v. *Duffield*, 2 Ch. D. 44; 45 L. J. Ch. 307.
(*t*) *Currie* v. *Larkins*, 10 L. T. 47; *Jeyes* v. *Savage*, L. R. 10 Ch. App. 555; 44 L. J. Ch. 706, reversing 23 W. R. 742; *Hutchison* v. *Hutchison* (1914), 51 Sc. L. R. 349 (provision to wife, obligation to pay "as soon as he is able").

ment; and to effect this general intention words will be put in (*u*), or be construed in a sense other than their natural one (*x*).

The Court, in construing settlements, looks with favour upon the interests of the children (*y*), but of course has no authority to extend the language of the settlement beyond the fair construction of the words (*z*), and cannot take into consideration the hardship of any individual case, but must judge upon the documents as it finds them. The safe rule of construction in general is to interpret the words according to their plain natural import, unless by so doing some manifest absurdity or inconvenience would follow, which will be sufficient to satisfy the Court that the person using the words must have used them in some sense different from that which would be their ordinary meaning (*a*).

The Administration of Estates Act, 1925 (*b*), provides that references to any Statute of Distribution in an instrument *inter vivos* or a will made or coming into operation after the commencement of the Act (January 1, 1926) shall be construed as references to Part IV. of the Act, and references to next-of-kin unless the context requires otherwise are to be construed as persons taking beneficially on an intestacy under the Act. Trusts in earlier instruments are to be construed as referring to enactments, other than the Intestates' Estate Act, 1890, which were in force before the commencement of the Act.

Contractual Capacity.—The general capacity to enter into a binding contract based on the consideration of marriage depends upon the *lex domicilii* of the parties (*c*); and by the same law the validity of a contract of settlement is to be decided in the absence of stipulations to the contrary (*d*).

Foreign Law.—Settlements involving questions of foreign law will be construed by the law of that country which was intended by the parties to govern their agreement (*e*), and if English subjects contract that their marriage rights shall be regulated by a foreign law (*f*), or if persons of foreign domicil

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(*u*) *Kentish* v. *Newman*, 1 P. Wms. 234.

(*x*) *Re Palmer*, L. R. 19 Eq. 320; 44 L. J. Ch. 247; *Re Daniel's Settlement Trusts*, 1 Ch. D 375.

(*y*) *Currie* v. *Larkins* (*ubi sup.*).

(*z*) *Reid* v. *Kenrick*, 1 Jur. (N.S.) 897; 24 L. J. Ch. 503.

(*a*) See *Scarisbrick* v. *Lord Skelmersdale*, 4 Y. & C. Ex. 78. S. C. on appeal, *Bootle* v. *Scarisbrick*, 1 H. L. Cas. 67.

(*b*) 15 Geo. V. c. 23, s. 50.

(*c*) *Cooper* v. *Cooper*, 13 App. Cas. 88.

(*d*) *Re Cooke's Trusts*, 35 W. R. 608; 56 L. J. Ch. 637. See further *Montgomery* v. *Zarifi*, 88 L. J. P. C. 20; 380—H. L. (Sc.).

(*e*) *In the Goods of Reid*, L. R. 1 P. 74; 35 L. J. P. 43; *Colliss* v. *Hector*, L. R. 19 Eq. 334; 44 L. J. Ch. 267.

(*f*) *Este* v. *Smyth*, 23 L. J. Ch. 705; 18 Beav. 112.

contract that their marriage rights shall be regulated by English law, the English Courts will give effect to such stipulations (*g*). In other words, the parties to a marriage contract are free to agree that the law of any country shall govern their proprietary rights (*h*); but if the parties are domiciled English subjects, and the provisions of the foreign law are repugnant to English law as inconsistent with public order and good morals, the Courts of this country will not give effect to them (*i*). Where a contract of marriage was executed in Scotland (where the marriage took place) by a domiciled Englishman described as residing in Scotland, and a Scotchwoman described as residing there, and whose domicil was Scotch, and trusts were declared of English real property of the husband in English form, and of personalty in Scotland belonging to the wife in English form, the trusts of the husband's property were construed by English law (*k*). So, too, where on the marriage of an Englishwoman in England with a domiciled Frenchman her personal property was settled in English form with English trustees, the settlement and the rights arising under it were construed by English law (*l*). The form and construction of the document are important factors in determining by what law it should be governed (*m*).

A contract of marriage made in England in the Scotch form between a domiciled Scotchman and an Englishwoman (the marriage taking place in England) will be construed according to Scotch law (*n*). But the mode of enforcing such contract must be in accordance with the law of the country to the tribunal of which recourse has been made (*o*).

The law of the husband's domicil governs the rights of the spouses to all movable property which is affected by an express contract entered into by them at the date of the marriage; so, too, where the law of the husband's domicil at the time of marriage provides, in the absence of an express contract, that the property of the spouses shall be subject to the law of the community of goods, such provision prevails for all time, whether

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(*g*) *Re Hernando, Hernando* v. *Sawtell*, 27 Ch. D. 284; 53 L. J. Ch. 865.
(*h*) See *Van Grutten* v. *Digby*, 32 L. J. Ch. 179; 31 Beav. 561; *Viditz* v. *O'Hagan*, [1900] 2 Ch. 87; 69 L. J. Ch. 507.
(*i*) *Re Fitzgerald, Surman* v. *Fitzgerald*, [1903] 1 Ch. 933; 73 L. J. Ch. 436. This case, though not the proposition in the text, was reversed, [1904] 1 Ch. 573.
(*k*) *Chamberlain* v. *Napier*, 15 Ch. D. 614; 49 L. J. Ch. 628. See *Re Barnard, Barnard* v. *White*, 56 L. T. 9.
(*l*) *Re Mégret, Tweedie* v. *Maunder*, [1901] 1 Ch. 547; 70 L. J. Ch. 451.
(*m*) *Re Bankes, Reynolds* v. *Ellis*, [1902] 2 Ch. 333; 71 L. J. Ch. 708.
(*n*) *Duncan* v. *Cannan*, 23 L. J. Ch. 265; 4 W. R. 2.
(*o*) *Don* v. *Lipmann*, 5 Cl. & F. 1.

the spouses preserve their original domicil or change it from time to time (*p*). It cannot be said that the law on this point is in a satisfactory condition, for there is yet another state of things in which a different principle is applied, viz., where the law of the original domicil is silent about, or does not clearly define, the proprietary rights of the spouses in the absence of an express contract. In this case the rights of the spouses may vary with their domicil from time to time (*q*). It may be asked whether in such a case a husband can acquire larger rights against his wife by change of domicil as she can against him? On principle he ought to be able to do so, but it may be doubted whether he would be permitted. The more logical and satisfactory principle to lay down would seem to be, where the parties on their marriage have expressly contracted to stand in certain proprietary relations to each other then no change of domicil should be allowed to affect or prejudice that contract. If, on the other hand, the spouses do not enter into any such express contract, then their proprietary relations should be governed by the law of their matrimonial domicil at the time when questions between them as to their respective rights arise.

The *lex rei sitæ* governs the relations of the spouses with regard to their real property (*r*); but if the regulations and provisions of the law of the matrimonial domicil are not inconsistent with those of the law of the situation effect will be given to them (*s*).

Section 5.

Enforcement of Settlements.

Statute of Frauds.—Promises and agreements *in consideration of marriage* (but not *promises to marry*) are within the provisions of the fourth section of the Statute of Frauds. That section runs, so far as it is applicable to the subject under discussion, as follows: "No action shall be brought . . . whereby to charge any person upon any agreement made upon consideration of marriage . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be

(*p*) *De Nicols* v. *Curlier*, [1900] A. C. 21; 69 L. J. Ch. 109.
(*q*) *Lashley* v. *Hog*, 4 Pat. 581; and see *De Nicols* v. *Curlier* (*ubi sup.*), in which case *Lashley* v. *Hog* is distinguished.
(*r*) *Re De Nicols, De Nicols* v. *Curlier*, [1900] 2 Ch. 410; 69 L. J. Ch. 680.
(*s*) *Ibid.*

charged therewith, or some other person thereunto by him lawfully authorized." Thus promises and settlements in consideration of marriage must conform to the requirements of the statute to be binding and to be specifically enforced. There is no magic in any particular formality to be observed in drawing up the intentions of the parties (*t*); the promise must be absolute, and contained in some writing or writings signed by the person who has made the promise, or by some agent whom he has lawfully authorized to act for him (*u*). Knowledge of the promise on the part of the person seeking to enforce it is necessary, for otherwise the marriage cannot be said to have taken place on the faith of it (*x*). It is now well settled that a written agreement after, in pursuance of a parol agreement before, marriage is a sufficient memorandum within the statute (*y*).

Marriage is not for the purposes of specific performance considered as a part-performance of a parol contract in relation to it, and for which it forms the consideration (*z*). So, where there was no ante-nuptial contract, but only a parol promise, and the settlement was made shortly after marriage, the settlement was set aside as being void as against creditors (*a*). But the recital of a parol ante-nuptial contract in consideration of marriage in a post-nuptial settlement is a sufficient note or memorandum within the Statute of Frauds to render the post-nuptial contract enforceable both as against the settlor and his trustee in bankruptcy (*b*). Again, the execution of a will made in the place of a marriage settlement, but revoked, is not a sufficient part-performance (*c*). But as between the parties themselves or their representatives the parol agreement is not void, and acts which, independently of the marriage, would be

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(*t*) See *ante*, p. 115.

(*u*) *Hammersley* v. *De Biel*, 12 Cl. & F. 45; *Coverdale* v. *Eastwood*, L. R. 15 Eq. 121; 42 L. J. Ch. 118; but see *Re Fickus*, *Farina* v. *Fickus*, [1900] 1 Ch. 331; 69 L. J. Ch. 161. This memorandum must be in existence at the time when the action to enforce the agreement is brought. *Lucas* v. *Dixon*, 22 Q. B. D. 317; 58 L. J. Q. B. 161.

(*x*) *Ayliffe* v. *Tracy*, 2 P. Wms. 66.

(*y*) Dart, V. & P. 250; *Taylor* v. *Beech*, 1 Ves. Sen. 297; *Hammersley* v. *De Biel*, 12 Cl. & F. 64 *n*.

(*z*) Fry, Sp. Perf. 268; Dart, V. & P. 1140; *Montacute* v. *Maxwell*, 1 P. Wms. 618; *Lassence* v. *Tierney*, 1 Mac. & G. 551.

(*a*) *Warden* v. *Jones*, 23 Beav. 487; 26 L. J. Ch. 427, in effect overruling a dictum of Lord Thurlow in *Dundas* v. *Dutens*, 1 Ves. 196; and see remarks of Sir G. Jessel in *Trowell* v. *Shenton*, 8 Ch. D. 324; 47 L. J. Ch. 738.

(*b*) *Re Holland*, *Gregg* v. *Holland*, [1902] 2 Ch. 360; 71 L. J. Ch. 518.

(*c*) *Caton* v. *Caton*, L. R. 2 H. L. 127; 36 L. J. Ch. 886. In this case Lord Cranworth thought that the acts of part performance could not be by the party sought to be charged, the principle being that it would be a fraud to set up the invalidity of the contract on the faith of which the other party had been induced to expend his money or alter his position.

acts of part-performance, are not the less so from being done in connection with it, and therefore such cases differ from cases where marriage is the sole act relied on. Thus, where there is a written agreement after in pursuance of a parol agreement before marriage, or where after the marriage possession of property is given up, or some other act is done, in pursuance of the parol agreement, which, independently of the marriage, would constitute part-performance, the contract may be enforced (*d*); and where a marriage was followed by the delivery up by the settlor of possession of the things verbally promised to be conveyed, the operation of the statute was held to be defeated (*e*). Again, as a representation made by one party for the purpose of influencing the conduct of the other party will in general be sufficient to entitle him to the assistance of the Court for the purpose of realizing such representation, so if a person, in the case of a marriage, acting on the faith of such representation, celebrates the marriage, equity will give effect to such representation, which, however, must have been reduced into writing (*f*). And where one party has put it out of his power to perform the contract, there is a breach in respect of which the other party has an immediate right of action to recover damages (*g*). Where a proposal in writing to leave property by will is made to induce a marriage, and is accepted, and the marriage takes place on the faith of it, if the proposal relates to a defined piece of real property the Court will decree a conveyance of that property after the death of the person making the proposal against all who claim under him as volunteers (*h*). But both the contract (*i*) and the acts in part-performance must be certain (*k*).

Specific Performance of Marriage Articles.—If marriage articles are in their nature such as can be enforced, the Courts will enforce them at the instance of those who are entitled. Thus the husband and wife and the issue of the marriage can call upon those who are bound by covenants to perform them, or upon their real or personal representatives and volunteers

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(*d*) *Walford* v. *Gray*, 13 W. R. 761; see also *Taylor* v. *Beech*, 1 Ves. Sen. 297; and *Barkworth* v. *Young*, 4 Drew. 1; *Re Holland*, *Gregg* v. *Holland*, [1902] 2 Ch. 360; 71 L. J. Ch. 518.

(*e*) *Surcome* v. *Pinniger*, 3 De G. M. & G. 571; *Ungley* v. *Ungley*, 5 Ch. D. 887; 46 L. J. Ch. 854; *Sharman* v. *Sharman*, 67 L. T. 834.

(*f*) *Hammersley* v. *De Biel*, 12 Cl. & F. 45.

(*g*) *Synge* v. *Synge*, [1894] 1 Q. B. 466; 63 L. J. Q. B. 202.

(*h*) *Ibid.*

(*i*) *Randall* v. *Morgan*, 12 Ves. 67.

(*k*) *Gulliver* v. *Gulliver*, 2 Jur. (N.S.) 700.

claiming under them (*l*), and purchasers with notice (*m*), but not upon purchasers without notice (*n*). If a stranger is a purchaser under the articles of any benefit or interest, and his equity is as capable of being enforced as if he claimed directly under the marriage consideration, he can claim to have them enforced (*o*). It is, however, a rule of equity that the articles must be specifically executed *in toto* or not at all, and this will be done without regard to the results thereby brought about, provided the interests of purchasers for value be not affected (*p*). Non-performance of the articles on one side is not as a rule an excuse for their non-performance on the other (*q*); unless the performance on the one side is clearly a condition precedent to the performance on the other (*r*).

Covenants entered into by the husband and wife respectively will be enforced; and also the covenants of third persons; for where a person agrees or covenants to do a thing, equity will treat it as done, and will decree its specific performance, either against him personally or against his estate (*s*).

Enforcement of Settlements.—It is necessary to consider next by whom, and on whose behalf, marriage settlements can be enforced. An agreement or promise in consideration of marriage is regarded very strictly and differently from the majority of other contracts, in that breach of the obligation on the one side is not a sufficient excuse for non-performance on the other (*t*); and if the covenants are mutually dependent upon each other, such dependence must be expressed in clear and explicit terms (*u*). By marriage the interests of others than the contracting parties, viz., the possible issue, are affected, and their rights are regarded with jealousy; indeed, "children born of the marriage are equally purchasers under both father and mother" (*x*). The marriage must be one recognized as legal, as otherwise unexecuted voluntary trusts will not be enforced, and the beneficial interest in the settled property will remain in the

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(*l*) *Trevor* v. *Trevor*, 1 P. Wms. 622; *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84.
(*m*) *Davies* v. *Davies*, 4 Beav. 54.
(*n*) *Warwick* v. *Warwick*, 3 Atk. 293.
(*o*) *Heap* v. *Tonge*, 9 Ha. 104.
(*p*) *Davenport* v. *Bishopp*, 1 Ph. 698.
(*q*) *Jeston* v. *Key*, 6 L. R. Ch. 610; 40 L. J. Ch. 503
(*r*) *Lloyd* v. *Lloyd*, 2 Myl. & Cr. 192, 204.
(*s*) *Graham* v. *Wickham*, 1 De J. G. & S. 474. See *ante*, sect. 3, Covenants in Settlements.
(*t*) *Jeston* v. *Key* (*ubi sup.*).
(*u*) *Lloyd* v. *Lloyd* (*ubi sup.*).
(*x*) *Harvey* v. *Ashley*, 3 Atk. 610.

settlor (*y*), but if a settlor confers on a stranger the absolute beneficial interest in property legally vested in trustees, though for an illegal consideration, *e.g.*, marriage within the prohibited degrees, such settlement will be upheld as against the settlor or his representative (*z*); but where the trustees of such a settlement seek the advice of the Court as to how to dispose of the trust funds, then the Court will not enforce the trust as being *contra bonos mores* (*a*). The execution of these covenants may be enforced by all interested parties—thus, by the husband (*b*), and the wife and her trustees against the husband (*c*), and she will be allowed to enforce the terms of an ante-nuptial contract for a settlement, where in ignorance of her rights she has, since the marriage, accepted a much smaller sum in satisfaction (*d*). The trustees can enforce them against the wife and children, though the wife will not be bound by her husband's covenant to settle her property on her next-of-kin (*e*). The children of the settlor, as well as the wife, are within the consideration of marriage, and can enforce their rights (*f*).

Though the covenants in a settlement are, as a rule, independent of one another, and may be enforced on one side, notwithstanding the other side has not performed those for which it is responsible, yet the defaulting party cannot enforce the covenants against the other party injured by his default (*g*). But if, on the one side, the covenant is contingent, and, on the other, the right is absolute, the latter may be enforced, though the performance of the contingent covenant is doubtful or impossible (*h*).

This leads to the inquiry, What is the nature of marriage as a consideration for contracts based upon it? Marriage is a *valuable* consideration, in fact the highest known to the law, and runs through the whole agreement based upon it, supporting every provision with regard to the husband, the wife, and the issue; and a settlement founded on it will not in general be

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(*y*) *Chapman* v. *Bradley*, 4 De G. & S. 71; *Pawson* v. *Brown*, 13 Ch. D. 202; 49 L. J. Ch. 193.

(*z*) *Ayerst* v. *Jenkins*, L. R. 16 Eq. 27; 42 L. J. Ch. 690. In this case there was a considerable lapse of time before attempting to impeach the settlement.

(*a*) *Phillips* v. *Probyn*, [1899] 1 Ch. 811; 68 L. J. Ch. 401.

(*b*) *Lee* v. *Lee*, 4 Ch. D. 175; 46 L. J. Ch. 81.

(*c*) *Hastie* v. *Hastie*, 2 Ch. D. 304; 34 L. T. 747.

(*d*) *Gilchrist* v. *Herbert*, 26 L. T. 381.

(*e*) *Gibbs* v. *Grady*, 41 L. J. Ch. 163; 20 W. R. 257.

(*f*) *Att.-Gen.* v. *Jacobs Smith*, [1895] 2 Q. B. 341.

(*g*) *Crofton* v. *Ormsby*, 2 Sch. & Lef. 602.

(*h*) *Basevi* v. *Serra*, 3 Mer. 674.

voluntary or fraudulent either within 13 Eliz. c. 5, or 27 Eliz. c. 4, now replaced by the Law of Property Act, 1925, ss. 172 and 173 (*i*), or the bankruptcy laws, but will have effect given to its terms. The issue of the marriage take as *purchasers* in right of both parents, as though they had given valuable consideration for their rights under it, and can enforce the performance of the covenants contained in it if default has been made on the one side or the other (*k*). The real difficulties as to enforcing settlements arise when those who are to take under them are collaterals, and so not strictly within the consideration of the agreement; it then sometimes becomes a question whether the trusts in their favour shall defeat the interests of adverse claimants. As a general rule, remainders to collaterals are voluntary, unless there be some limitations subsequent to them within the consideration, which must be supported, or unless a valuable consideration be given (*l*). But to enable volunteers under a post-nuptial settlement, such as children of a former marriage, to enforce the trusts, such trusts must have been perfected, and the Court will refuse to perfect them in favour of children who are strangers to the contract, though valuable consideration has moved between the parties to the settlement, where such trusts remain to be perfected; but where the settlement can be said to be for valuable consideration as regards the collaterals, then the Court will interfere on their behalf (*m*). Where the limitations in favour of volunteers (*e.g.*, children by a former marriage) are intended by the settlor to be covered by the limitations in favour of those within the marriage consideration, so that the latter cannot take effect without also giving effect to the former, then in such case the limitations in favour of collaterals or volunteers can be enforced by them, and are good as against subsequent purchasers or assignees for value (*n*). Certain limitations in favour of collaterals are supported against subsequent purchasers as being for valuable consideration; for instance, a settlement by a widow in favour of her issue by a

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(*i*) 15 Geo. V. c. 20.

(*k*) *Crofton* v. *Ormsby* (*ubi sup.*); *Campbell* v. *Ingilby*, 27 L. T. (o.s.) 51; *Jeston* v. *Key*, 6 L. R. Ch. 610; 40 L. J. Ch. 503.

(*l*) *Stackpoole* v. *Stackpoole*, 4 Dr. & War. 320. See also *Kekewich* v. *Manning*, 1 De G. M. & G. 176; *Wollaston* v. *Tribe*, L. R. 9 Eq. 44; 21 L. T. 449; *Re D'Angibau*, *Andrews* v. *Andrews*, 15 Ch. D. 228; 49 L. J. Ch. 756; followed in *Re Pryce*, *Neville* v. *Pryce*, [1917] 1 Ch. 234; 86 L. J. Ch. 383.

(*m*) *Green* v. *Patterson*, 32 Ch. D. 95; 56 L. J. Ch. 181.

(*n*) *De Mestre* v. *West*, [1891] App. Cas. 264; 60 L. J. P. C. 66; and see *Mackie* v. *Herbertson*, 9 App. Cas. 303

former marriage (*o*), and even where her issue is illegitimate (*p*); but the limitations in a marriage settlement in favour of a widower's children have been held to be voluntary and void under 27 Eliz. c. 4, against a subsequent purchaser (*q*). Section 172 of the Law of Property Act, 1925 (*r*), which makes voluntary settlements with intent to defraud creditors voidable, does not extend to property conveyed upon good consideration and in good faith to persons not having at the time of the conveyance notice of an intent to defraud creditors. The settlement under which such volunteers claim is voluntary within the meaning of the Customs and Inland Revenue Acts, 1881 (*s*) and 1889 (*t*), so far as the incidence of account duty is concerned (*u*). But in regard to reversion duty under the Finance Act, 1910 (*w*), payable in respect of the reversions of leases "purchased" before April 30, 1909, it has been held that reversions settled on the trusts of a marriage settlement were not exempt from duty (*x*). Limitations in a settlement in favour of the issue of a second marriage have also been held good against a subsequent purchaser for value of the property comprised in the settlement (*y*).

This point has given rise to much litigation and dispute, and decisions on it have varied from time to time. The general run of the cases would seem to warrant the conclusion that, as against the settlor and those claiming under him, limitations in favour of collaterals contained in an ante-nuptial settlement are binding (*z*), on the ground that if two parties in contemplation of a marriage intended, and afterwards had, between them, or

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(*o*) *Newstead* v. *Searles*, 1 Atk. 265; that is, though volunteers in a sense, they are not liable to be defeated by subsequent purchasers, under 27 Eliz. c. 4. See Lindley, L.J., in *Att.-Gen.* v. *Jacobs Smith*, [1895] 2 Q. B. 341; 64 L. J. Q. B. 605. See *Mackie* v. *Herbertson* (*ubi sup.*).

(*p*) *Clarke* v. *Wright*, 6 H. & N. 849. In this case the Court of Exchequer Chamber upheld the principle of decision in *Newstead* v. *Searles* (*ubi sup.*). But see *Smith* v. *Cherrill*, L. R. 4 Eq. 390.

(*q*) *Re Cameron* v. *Wells*, 37 Ch. D. 32. In this case, Kay, J., refused to extend the principle of *Newstead* v. *Searles* (*ubi sup.*), and said: "The only persons who come within the marriage consideration—*i.e.*, the only persons from whom it is assumed that consideration moves—are the husband and wife and the children of the marriage. The phrase that they 'come within the marriage consideration' means that they must be treated as persons from whom consideration moves for the settlement. If there is in the settlement a limitation in favour of collaterals, no consideration moves from those collaterals unless they settle property of their own."

(*r*) 15 Geo. V. c. 20. (*s*) 44 & 45 Vict. c. 12, s. 38.

(*t*) 52 & 53 Vict. c. 7, s. 11.

(*u*) *Att.-Gen.* v. *Jacobs Smith* (*ubi sup.*).

(*w*) 10 Edw. VII., c. 8, s. 14 (1).

(*x*) *Commissioners of Inland Revenue* v. *Gribble and others*, [1913] 3 K. B. 212; 82 L. J. K. B. 900.

(*y*) *Clayton* v. *Earl of Wilton*, 3 Madd. 302; Sugd. V. & P. 716 *n.*, 717.

(*z*) *Davenport* v. *Bishopp*, 1 Ph. 698.

for any other consideration between themselves, coming under the description of valuable, have entered into a contract together, in which one of the stipulations made by them is a stipulation solely and merely for the benefit of a third person, that third person being even a stranger in blood to each, a stranger to the contract, and a person from whom not any valuable or meritorious consideration moves, has moved, or is to move, it cannot, generally speaking, be competent to a party to the contract to say that that stipulation shall go for nothing, or shall not have any effect given to it. The Court will not apply to the consideration of provisions in favour of volunteers contained in a contract founded on marriage the principles on which it would act in considering provisions contained in a voluntary settlement (*a*).

In *Wollaston* v. *Tribe* (*b*), however, it was held that trusts in favour of the children of a future marriage and of collaterals were purely voluntary, and could be set aside. But the Court of Appeal has since decided that where a trust for volunteers had been executed by the trust fund having been transferred to the trustees of the settlement, the trust cannot be revoked by the settlor, and the claims of the volunteers defeated (*c*). *Wollaston* v. *Tribe* has been doubted in the more recent case of *Tucker* v. *Bennett* (*d*).

Voluntary Trusts as against bona fide Purchasers.—That marriage will support every settlement made in consideration of it will not hold true, as will be seen further down (*e*). Mr. Dart submits that the proper test of how far these voluntary trusts will be supported as against subsequent *bona fide* purchasers is, "that where the limitations over are in favour of collateral relations or connections, not of the settlor, but of the other contracting party (whether wife or husband), the settlement itself may be considered *prima facie* evidence of such other party having stipulated for their insertion. So where, on a settlement of the intended wife's estate, the limitations over are in favour of her own collateral relations in derogation from her husband's marital right by survivorship (in case of personalty), or as tenant by the curtesy (in case of realty). Where

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(*a*) *Tucker* v. *Bennett*, 38 Ch. D. 1; 57 L. J. Ch. 507.
(*b*) L. R. 9 Eq. 44; 21 L. T. 449. See also *Gibbs* v. *Grady*, 41 L. J. Ch. 163; 20 W. R. 257.
(*c*) *Paul* v. *Paul*, 20 Ch. D. 742; 51 L. J. Ch. 839.
(*d*) 38 Ch. D. 1; 57 L. J. Ch. 507.
(*e*) *Post*, p. 129, sub-tit. Revocation and Setting Aside of Settlements.

in any case other than that referred to, the limitations over are in favour of the collateral relations or connections of the settlor, such presumption cannot so readily arise; but it might be proved that the other party stipulated for their insertion" (*f*). Again, "where the settlement is made by aid of a party other than the husband and wife—as where on the marriage of the tenant in tail, the tenant for life in possession concurs in barring the entail, and resettling the estate—the validity of limitations in favour of other branches of the family, and it is conceived of strangers, seems to be unquestionable" (*g*).

To sum up the foregoing: marriage is of itself a valuable and good consideration, and will support a settlement and disposition of property without any other consideration of a pecuniary or lucrative nature passing. No formal contract of this kind need be entered into; and though the agreement does not show on its face that marriage was the consideration, yet if sufficient evidence can be gathered from the document itself, and from other materials in the case, that it was the consideration, that will be enough (*h*).

Section 6.

Rectification of Settlements.

Variance.—The intervention of the Court to rectify settlements is not infrequently requisite in cases where they purport to have been made in pursuance of ante-nuptial articles, and do not carry out the intentions of the parties by reason of a variance between the original articles and the settlements. The earlier cases dealing with the rectification of settlements by marriage articles have been followed in modern times (*i*). Where a settlement directed to be made by a testator was improperly framed, it was altered and corrected according to the intention of the testator as expressed in his will (*k*).

Where articles and a settlement expressed to be made in pursuance of such articles are both made before marriage, and there is any variance, there no evidence is necessary in order to have the settlement corrected, for the settlement will be rectified

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(*f*) Dart. V. & P. 7th ed. 922.
(*g*) Dart. V. & P. 7th ed. 924.
(*h*) *Hammersley* v. *De Biel*, 12 Cl. & F. 62 *n.*
(*i*) *Cogan* v. *Duffield*, 2 Ch. D. 44; 45 L. J. Ch. 307.
(*k*) *Lord Glenorchy* v. *Bosville*, Ca. t. Talb. 3; 1 Wh. & T. L. C. 1.

by the articles (*l*). But where the settlement contains no reference to the articles, yet if it can be shown that the settlement was intended to be in conformity with the articles, and there is clear and satisfactory evidence proving that the discrepancy has arisen from a palpable mistake, the Court will receive such evidence and re-form the settlement, and make it conformable to the real and clear intention of the parties (*m*). Thus, where a settlement was drawn up contrary to the terms of the agreement for it, it was ordered to be settled in accordance with such terms (*n*).

Mistake.—Mistake is another ground on which the Court will rectify settlements. The equitable relief of rectification is not confined to mere informal contracts by altering and conforming them to the real intention of the parties, but is extended to solemn instruments made and executed by the parties, whether in pursuance or not of preliminary contracts, on the principle that, where the original intention of the parties has not been carried out, the Courts administering equity ought to relieve against a clear mistake (*o*). It is necessary that the mistake be common to both parties (*p*), and the Court invariably acts with caution in rectifying marriage settlements, and in requiring strong proof of the exact contract which the parties intended to enter into (*q*), and will be guided by contemporaneous evidence as to what was the intention of the parties at the time of the execution of the deed, and not what would have been their intention if, when they executed it, the result of what they did had been present to their minds (*r*).

The mistake need not be common to both parties where there was a fiduciary relation between one of them and the other, and where it was the duty of the one to explain to the other the real scope and effect of the deed executed between them. Thus, where the terms of a settlement were such as the Court would not have sanctioned in the absence of agreement, and ought to have been explained before execution, the settlement was recti-

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(*l*) *Bold* v. *Hutchinson*, 24 L. J. Ch. 285; *Harbidge* v. *Wogan*, 5 Ha. 258; *Smith* v. *Iliffe*, L. R. 20 Eq. 666; 44 L. J. Ch. 755; *Cogan* v. *Duffield* (*ubi sup.*).

(*m*) *West* v. *Erissey*, 1 Br. P. C. 225; *Rogers* v. *Earl*, 1 Dick, 294; *Bold* v. *Hutchinson* (*ubi sup.*).

(*n*) *Corley* v. *Lord Stafford*, 1 De G. & J. 238.

(*o*) St. Eq. Jur. 159; *Smith* v. *Iliffe* (*ubi sup.*); *Higginson* v. *Kelly*, 1 B. & B. 253.

(*p*) *Earl of Bradford* v. *Earl of Romney*, 6 L. T. 208; 10 W. R. 414; *Sells* v. *Sells*, 1 Dr. & Sm. 42.

(*q*) *Harris* v. *Pepperell*, L. R. 5 Eq. 1, citing *Earl of Bradford* v. *Earl of Romney* (*ubi sup.*); *Tucker* v. *Bennett*, 38 Ch. D. 1; 57 L. J. Ch. 507.

(*r*) *Wilkinson* v. *Nelson*, 9 W. R. 393; *Tucker* v. *Bennett* (*ubi sup.*).

fied on the uncorroborated testimony of the surviving party, who had been deceived, and the burden of proof that the settlement should not be rectified was held to rest upon the representatives of the party who ought to have explained the operation of the settlement (*s*). Where a father is living on affectionate terms with his daughter he is the proper person to recommend and advise her in matters relating to the provisions of her marriage settlement, and there is no occasion for independent legal advice beyond that of the solicitor who is preparing the lady's settlement. But if the father is taking under the settlement a benefit from the daughter, then she ought to be separately advised (*t*).

This power of rectification the Court of Chancery was formerly exerciseable upon a petition under the Trustee Relief Act, 1847 (*u*), as well as in an action (*x*), but now only in an action.

The mistake will be rectified, not only on behalf of the husband or wife, but of the issue of the marriage (*y*); and although a vested interest may be acquired, yet if a deed was executed in a form in which it ought not to have been, and which the Court is satisfied is not in conformity with the intention of the parties, then, regardless of all interests acquired, the Court will put the deed into a form which is in accordance with the intention of the parties (*z*).

The Court will admit parol evidence to rectify the settlement even after a long lapse of time (*a*), but the longer the lapse the more careful will the Court be in scrutinizing the evidence (*b*), yet under certain circumstances such parol evidence of the survivor of the parties to the deed need not be corroborated (*c*). The defence of the Statute of Frauds (section 4) to an action for rectification of a settlement is not *per se* a good one (*d*).

Fraud.—Relief will also be granted by the Court on the ground of fraud. It will be granted on the broad and substantial basis that if a person is induced to enter into a contract by

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(*s*) *Lovesy* v. *Smith*, 15 Ch. D. 655; and see *Johnson* v. *Bragge*, [1901] 1 Ch. 28; 70 L. J. Ch. 41.

(*t*) *Tucker* v. *Bennett*, 38 Ch. D. 1; 57 L. J. Ch. 507.

(*u*) 10 & 11 Vict. c. 96, s. 2, repealed by the Trustee Act, 1893, which is repealed by the Trustee Act, 1925.

(*x*) *Re Bird's Trusts*, 3 Ch. D. 214.

(*y*) *King* v. *King-Harman*, Ir. Rep. 7 Eq. 446.

(*z*) *Welman* v. *Welman*, 15 Ch. D. 570, 578; 49 L. J. Ch. 736.

(*a*) *Wolterbeck* v. *Barrow*, 23 Beav. 423.

(*b*) *M'Cormack* v. *M'Cormack*, 1 Ir. Ch. D. 119; *Cook* v. *Fearn*, 48 L. J. Ch. 63; 39 L. T. 348. There is a dictum of Lord Romilly that a settlement will not be rectified or re-formed after too long a period of time. *Gibbs* v. *Grady*, 41 L. J. Ch. 163; 20 W. R. 257.

(*c*) See *Lovesy* v. *Smith*. 15 Ch. D. 655.

(*d*) *Johnson* v. *Bragge*, [1901] 1 Ch. 28; 70 L. J. Ch. 41.

the fraudulent statements of another, the persons making such statements should be held to them; and "a representation by one party, for the purpose of influencing the conduct of the other party, will in general be sufficient to entitle him to the assistance of this Court for the purpose of realizing such representation" (*e*). Mere mistake will not suffice (*f*), and the representation must not be of mere *intention* but of some fact (*g*). Equity will relieve, not only on the ground of fraud, but of improvidence, and particularly in the case of a woman where the settlement was made very soon after attaining twenty-one (*h*).

SECTION 7.

Revocation and Setting Aside of Settlements.

It is now clear law that a settlement made in contemplation of marriage can be revoked before marriage takes place. In one case, however (*i*), a settlement revoked before marriage was held valid and subsisting, while in other cases (*k*) the contrary doctrine was upheld; but the parties must act in good faith. In modern settlements, as a rule, the possibility of the marriage not taking place is provided for by directing the trustees to hold the settled property in trust for those to whom it belongs until the marriage, and thenceforth upon the trusts to arise on that event (*l*). Where the marriage has taken place, or there is no power of revocation in the deed, the settlement is, of course, irrevocable (*m*). If a settlement contain a power of revocation, a conveyance to a subsequent purchaser for value will defeat the settlement, though made for valuable consideration (*n*); but the mere fact of a power of revocation in the settlement being

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(*e*) *Hammersley* v. *De Biel*, 12 Cl. & F. 45.
(*f*) *Evans* v. *Wyatt*, 10 W. R. 813.
(*g*) *Jorden* v. *Money*, 5 H. L. Cas. 185; Peach. Sett. 87.
(*h*) See *Everitt* v. *Everitt*, L. R. 10 Eq. 405.
(*i*) *Page* v. *Horne*, 11 Beav. 227.
(*k*) *Robinson* v. *Dickenson*, 3 Russ. 399; *Thomas* v. *Brennan*, 15 L. J. Ch. 420; *Mitford* v. *Reynolds*, 16 Sim. 131; *Bond* v. *Walford*, 32 Ch. D. 238; 55 L. J. Ch. 667. The circumstances of *Robinson* v. *Dickenson* were peculiar. The settlement was ante-nuptial; the marriage was discovered to be void; the parties revoked the settlement, and executed another differing in some respects from the first, and then were validly married. The trusts of the *second* settlement were upheld.
(*l*) It is not unusual now to provide that if the marriage does not take place within a given period—*e.g.*, a year—the trust property shall revert absolutely to the settlor.
(*m*) *Vandeleur* v. *Vandeleur*, 3 Cl. & F. 82.
(*n*) 27 Eliz. c. 4, s. 5. See Sugd. V. & P. 721; Peachey, chap. viii. pp. 226 *et seq.*

reserved to the husband is not *per se* evidence that the settlement was fraudulent (*o*).

Setting Aside of Settlements.—Settlements, including those on marriage, may be set aside, though based on valuable consideration, if they lack *bona fides* in their inception, and are made with a fraudulent purpose, but a settlement will not be set aside at the instance of one spouse on the ground of an alleged fraudulent representation of ante-nuptial moral misconduct on the part of the other spouse (*p*). The Court of Chancery can always relieve against the terms of a void settlement (*q*).

Voluntary settlements, or those in which no consideration moves, may be set aside. If there be anything in the shape of consideration which can be called valuable the settlement is not voluntary. But even though voluntary they may be supported and enforced if they are executed in good faith, and do not prevent the settlors from satisfying the claims of their creditors.

Thus, not every arrangement for valuable consideration will be supported, nor every voluntary arrangement set aside, because the valuable consideration is wanting.

As between the parties, a settlement, though voluntary, is perfectly valid, and cannot be set aside at the mere will of the settlor (*r*), except where he has transferred the subject of the settlement to subsequent purchasers for value, and this irrespectively of whether the latter had or had not notice of the voluntary arrangement (*s*); but in many instances the settlement will be supported in favour of the volunteers as against subsequent purchasers for value. Section 173 (2) of the Law of Property Act, 1925 (*t*), provides that a voluntary settlement is not to be deemed fraudulent by the mere fact of a subsequent settlement for valuable consideration having been made after June 28, 1893. Where a settlor seeks to have a voluntary settlement set aside on the ground of mistake, the onus of proof lies upon him, and the Court, especially after long acquiescence, will exact very clear and convincing evidence of such mistake, and if it is not forthcoming will refuse to deprive the volunteers of their interests (*u*).

(*o*) *Ex parte Tarn, Re Tarn*, 57 J. P. 789.
(*p*) *Johnston* v. *Johnston*, 52 L. T. 76; 33 W. R. 239.
(*q*) See *Allcard* v. *Walker*, [1896] 2 Ch. 369; 65 L. J. Ch. 660.
(*r*) For the same principles of law, see *ante*, section 5, Enforcement of Settlements.
(*s*) Under 27 Eliz. c. 4; *Otley* v. *Manning*, 9 East, 59.
(*t*) 15 Geo. V. c. 20.
(*u*) *Henry* v. *Armstrong*, 44 L. T. 918.

Fraudulent Settlements.—A marriage settlement, like any other, is liable to be set aside by those whose claims on the settlor are affected by its dispositions, for though marriage is a valuable consideration, it will not support every settlement. This has been the law since the passing of 13 Eliz. c. 5 (made perpetual by 29 Eliz. c. 5). By the second section of that Act it was enacted that all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements and hereditaments, goods and chattels, &c., made with a fraudulent and covinous intent to disturb, hinder, delay, or defraud the rights of others, shall as against such be clearly and utterly void and of none effect. The intention of this statute is to protect the rights of creditors, and the effect of it is that every conveyance or settlement, whether for valuable consideration or voluntary, must be *bona fide* in its inception. 13 Eliz. c. 5, is repealed by the Law of Property Act, 1925 (*t*), and by section 172 that Act provides that every conveyance of property made, whether before or after January 1, 1926, with intent to defraud creditors shall be voidable at the instance of any person thereby prejudiced. The section does not affect the law of bankruptcy, and does not extend to any estate or interest in property conveyed for valuable consideration and in good faith, or upon good consideration and in good faith to any person not having at the time of the conveyance notice of the intent to defraud creditors.

A settlement, though made for valuable consideration (marriage not excepted), will, if entered into with the intent to defeat, hinder, and delay the creditors of the settlor, be set aside (*x*) if evidence of such intention is forthcoming (*y*). A husband who by a mere post-nuptial settlement covenants that his life interest in his wife's reversionary estate should, when the property fell into possession, be determinable on his bankruptcy, evinces such an intention (*z*). Every voluntary conveyance is not void against the creditors as being fraudulent, but may be good and valid if there be a reasonable cause for its existence (*a*).

A broad and important distinction is to be drawn between ante-nuptial and post-nuptial settlements as to their liability to be set aside as being within the mischief of these Acts.

(*x*) *Twyne's Case*, 3 Rep. 80 *b*.
(*y*) *Re Tetley, Ex parte Jeffery*, 66 L. J. Q. B. 111.
(*z*) *Re Holland, Gregg* v. *Holland*, [1902] 2 Ch. 145; 71 L. J. Ch. 518.
(*a*) *Holmes* v. *Penney*, 26 L. J. Ch. 179; 5 W. R. 132; *Beckett* v. *Tasker*, 19 Q. B. D. 7.

Ante-nuptial Settlements.—To set aside an ante-nuptial settlement it is necessary to prove an actual and express intent to defeat creditors (*b*). Fraud of the settlor brings the settlement within the scope of the Acts. Where a settlement is based upon valuable consideration, both settlor and purchaser under the deed must concur in the fraud (*c*). In *Campion* v. *Cotton* (*d*) it was laid down that where there was no evidence of fraud in the purpose of the settlement, an ante-nuptial settlement could not be set aside, though the settlor was at the time of the making of it in embarrassed circumstances, and there was a false recital that the settled property belonged to the wife. In the same case it was held that the fact of the settlor's being indebted at the time of the settlement and of the wife knowing him to be so would not affect the validity of the deed.

Again, in *Fraser* v. *Thompson* (*e*), it was said by Vice-Chancellor Stuart: "Unless the court finds that the sacred nature of that consideration has been profaned, and finds that the ceremony of marriage has been resorted to as a mere pretence and cloak for fraud, and finds clear evidence that it is a fraudulent marriage, there is no case in which any settlement of property made previous to and in consideration of marriage has been set aside on the ground of the insolvency or embarrassed circumstances of the husband, or as fraudulent against his creditors on a subsequent bankruptcy" (*f*).

In *Colombine* v. *Penhall* (*g*) this fraudulent intent to defeat the rights of creditors was apparent. In each of these last two cases the wife was aware of her future husband's embarrassed circumstances, and was party to the fraud, and no consideration for the settlement, apart from the marriage, moved from her. Such a settlement is an act of bankruptcy by the settlor; and the marriage consideration will not support a settlement of property which does not fairly and rightfully belong to the settlor but to his creditors (*h*).

"A voluntary conveyance by a person not indebted is clearly

(*b*) *Colombine* v. *Penhall*, 1 Sm. & G. 228; *Penhall* v. *Elwin*, 1 Sm. & G. 258; *Bulmer* v. *Hunter*, L. R. 8 Eq. 46; 38 L. J. Ch. 543.

(*c*) *Re Johnson, Golden* v. *Gillam*, 20 Ch. D. 389; 51 L. J. Ch. 503, affirming 20 Ch. D. 389.

(*d*) 17 Ves. 49.

(*e*) 1 Giff. 49, 65. The decision of the Vice-Chancellor was overruled (4 De G. & J. 659), expressly on the ground that there was evidence of fraud and an intention to defeat creditors in that case.

(*f*) See *Parnell* v. *Steadman*, 1 Cab. & Ell. 153; *Re Pennington, Ex parte Cooper*, 59 L. T. 774; 5 Morr. Bk. Rep. 268.

(*g*) *Ubi sup.*

(*h*) *Fraser* v. *Thompson*, 4 De G. & J. 659; *Colombine* v. *Penhall* (*ubi sup.*).

good against creditors. . . . Fraud vitiates the transaction, but a settlement not fraudulent, by a party not indebted, is valid though voluntary" (*i*).

Post-nuptial Settlements.—Where the settlement is voluntary, or post-nuptial, no actual proof of an intention to defraud creditors need be forthcoming, and it will be set aside if the circumstances are such that it would necessarily have the effect of defeating and delaying their rights (*k*). No man is allowed to be generous before he is just (*l*), even if generosity dictate the act.

Test of Validity.—There has been much doubt expressed as to what is the true rule or test to be applied to the validity or invalidity of these voluntary settlements. In *Spirett* v. *Willows* (*m*) Lord Westbury laid down: "If the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement. But if a voluntary settlement or deed of gift be impeached by subsequent creditors whose debts had not been contracted at the date of the settlement, then it is necessary to show evidence that the debtor made the settlement with express intent to delay, hinder, or defraud creditors, or that after the settlement, the settlor had not sufficient means or reasonable expectation of being able to pay his then existing debts, that is to say, was reduced to a state of insolvency, in which case the law infers that the settlement was made with intent to delay, hinder, or defraud creditors, and is therefore fraudulent and void." These propositions have been treated as going too far, and as not being in harmony with the decided cases; and the true test would appear to be whether from all the circumstances the Court can infer that the settlement was made with the intent, actual or constructive, of delaying or hindering creditors (*n*). Thus, where a trader by a post-nuptial settlement settled all his property of every description, both present and future, upon trust for his wife for her separate use

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(*i*) Per Sir T. Plumer, M.R., in *Battersbee* v. *Farrington*, 1 Swanst. 113.
(*k*) *Freeman* v. *Pope*, L. R. 5 Ch. App. 538; 39 L. J. Ch. 689.
(*l*) *Copis* v. *Middleton*, 2 Madd. 410, 430.
(*m*) 34 L. J. Ch. 365; 11 Jur. (N.S.) 70
(*n*) *Crossley* v. *Elworthy*, L. R. 12 Eq. 158; 40 L. J. Ch. 480; *Freeman* v. *Pope* (*ubi sup.*) (in this case *Spirett* v. *Willows* was considered, and commented on, as mentioned in the text); *Ex parte Russell, Re Butterworth*, 19 Ch. D. 588; 51 L. J. Ch. 521.

for life, remainder for himself for life, remainder for his children, reserving the control of his stock-in-trade to himself, and five years later became bankrupt, the settlement was set aside as being void under the statute, though it did not appear that the settlor was indebted at the time of its execution, except on mortgages on part of the settled property, which had since been satisfied (*o*). So, too, in the case of *Mackay* v. *Douglas* (*p*), a voluntary settlement, by which the settlor took the bulk of his property out of the reach of his creditors shortly before engaging in a trade, was set aside in a suit on behalf of creditors who had become such after the settlement, though there were no creditors whose debts arose before the date of the settlement, and there was a doubt at the time of the settlement whether the settlor would or would not engage in the trade. In the same case it was held that in order to set aside a voluntary settlement it is not necessary to show that the settlor contemplated becoming actually indebted; it is sufficient if he contemplated a state of things which might result in bankruptcy or insolvency.

Want of consideration, accompanied by embarrassed circumstances, has generally been considered to be sufficient to invalidate a deed. Whilst, on the one hand, it is not necessary that the settlor should be absolutely insolvent at the date of the deed, so, on the other hand, the mere fact of his being indebted is not sufficient to invalidate the deed; but if the property omitted from the settlement and immediately available for the payment of his debts, is not sufficient for that purpose, the deed will be fraudulent and void within the statute (*q*). In an American case (*r*), it was held that a settlement on his wife made by a husband when solvent and in a condition to make such a gift, if not unreasonable in amount, and where after its making there were abundant assets to pay his debts, was good. So, too, a post-nuptial settlement executed with the approval of the Court of Chancery by an infant wife after she had contracted a debt of no very great amount was upheld as against her creditor (*s*).

Who may Impeach the Settlement.—If the deed is set aside at the instance of creditors existing at the date of the deed, subsequent creditors are entitled to the benefit of the suit, and

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(*o*) *Ware* v. *Gardner*, L. R. 7 Eq. 317; 38 L. J. Ch. 348.
(*p*) L. R. 14 Eq. 106; 41 L. J. Ch. 539. See *Re Johnson*, *Golden* v. *Gillam*, 20 Ch. D. 389; 51 L. J. Ch. 503.
(*q*) See *Re Ridler*, *Ridler* v. *Ridler*, 22 Ch. D. 74; 52 L. J. Ch. 343.
(*r*) *Sedgwick* v. *Place*, 6 Am. Law. Rev. 181, reported in 25 L. T. 307.
(*s*) *Hemingway* v. *Braithwaite*, 61 L. T. 224.

to come in *pari passu* with the antecedent creditors; and a subsequent creditor may maintain a suit to set aside the deed, if any debt owing at its date remain due, or it can be shown that the deed was intended to defeat subsequent creditors (*t*); but the onus of proof of fraud lies on such subsequent creditors (*u*). The mere existence of a debt at the time of the settlement would not necessarily invalidate it (*x*), but it must be substantial indebtedness. A voluntary settlement has been upheld which was made by a husband on his wife and children, not indebted at the time, and without any clear fraudulent intention to defeat his creditors (*y*); but a voluntary settlement by a woman was set aside where it deprived her of the means of paying her debts (*z*). But a voluntary settlement in which provision is made for the payment of the settlor's debts will be upheld as against future creditors, and the mere fact of a single creditor being unpaid will not invalidate it (*a*). When realty which has been settled by a voluntary deed is sold to a purchaser for value the volunteers under the settlement have no title to the purchase-money (*b*).

Voluntary Settlements of Real Estate by Women.—The voluntary settlement by a woman of her real estate is governed by the same rules as that of a man, except, it would seem, where she was married at the time she entered into it, and was restrained from anticipating or aliening it; during coverture she could not give a valid title to a subsequent purchaser, though, if she became discovert, the voluntary nature of the transaction would enable her to defeat her volunteers (*c*). The foregoing principles are applicable to the settlements of women as well as of men; for by the Married Women's Property Act, 1882 (*d*), it is provided that "no settlement or agreement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors." If she by ante-nuptial settlement withdraw property from her existing creditors with the intent to defeat or delay them, the arrangement will be set

(*t*) *Stileman* v. *Ashdown*, 2 Atk. 477; *Barling* v. *Bishopp*, 29 Beav. 417; *Jenkyn* v. *Vaughan*, 3 Drew. 419; *Mackay* v. *Douglas*, L. R. 14 Eq. 106; 41 L. J. Ch. 539.

(*u*) *Crossley* v. *Elworthy*, L. R. 12 Eq. 158; 40 L. J. Ch. 480.

(*x*) *Kidney* v. *Coussmaker*, 12 Ves. 148.

(*y*) *Battersbee* v. *Farrington*, 1 Swanst. 106; but see *contra*, *Lush* v. *Wilkinson*, 5 Ves. 387.

(*z*) *Smith* v. *Cherrill*, L. R. 4 Eq. 390; 15 W. R. 919.

(*a*) *Re Johnson, Golden* v. *Gillam*, 20 Ch. D. 389; 51 L. J. Ch. 503.

(*b*) *Daking* v. *Whymper*, 26 Beav. 568.

(*c*) Probable effect of section 19 of Married Women's Property Act, 1882.

(*d*) 45 & 46 Vict. c. 75, s. 19.

aside; so, too, if at the time of making a post-nuptial or voluntary settlement she was substantially indebted, in the absence of evidence to show that she actually intended to defraud or delay her creditors, the arrangement will be set aside. But there is this distinction between her case and that of her husband, viz., that while he cannot even by an ante-nuptial agreement for valuable consideration covenant to bring his after-acquired property into settlement, so as to withdraw it from his post-nuptial creditors, she can so validly covenant, and a restraint against anticipation put upon herself for that purpose will be effectuated (*e*).

Settlements affected by 27 Eliz. c. 4, and subsequent Statutes.—This statute, which was made perpetual by 30 Eliz. c. 57, was passed for the protection of *purchasers*, and affects only real estate. It enacted that every conveyance, grant, charge, lease estate and limitation of use of in or out of any lands, tenements, or hereditaments whatsoever, for the intent and purpose to defraud and deceive such persons, &c., as should purchase them, should be wholly void and frustrate against such purchasers, or those who claimed under them.

The Voluntary Conveyances Act, 1893 (*f*), provided that no voluntary conveyance, whether made before or after the passing of the Act, if made *bona fide* and without any fraudulent intent, should be deemed fraudulent or covinous within the statute of Elizabeth by reason of any subsequent purchase for value, or be defeated by a conveyance made upon such purchase. The Act, however, did not apply where the author of the voluntary conveyance had before the passing of the Act disposed of or dealt with the lands to or in favour of a purchaser for value. The Law of Property Act, 1925 (*g*), repeals both the statute 27 Elizabeth and the Voluntary Conveyances Act, and enacts (*h*) that every conveyance of property with intent to defraud creditors shall be voidable at the instance of any person thereby prejudiced, at whatever date it was made, but this provision does not extend to any estate or interest conveyed for valuable consideration and in good faith or upon good consideration and in good faith to any

(*e*) Effect of section 19 of Married Women's Property Act, 1882. The latter part of this section, which limits the effect of the restriction against anticipation, and puts a woman's settlement on the same level as a man's in respect of her creditors, is not retrospective, but applies only to settlements made after the Act came into force. *Smith* v. *Whitlock*, 55 L. J. Q. B. 286; 34 W. R. 414.

(*f*) 56 & 57 Vict. c. 21, s. 2.

(*g*) 15 Geo. V. c. 20.

(*h*) Sect. 172.

person not having notice of the intent to defraud creditors, and that (*i*) every voluntary disposition of land made with intent to defraud a subsequent purchaser is voidable at the instance of such purchaser; but no voluntary disposition whenever made shall be deemed to have been made with intent to defraud by reason only that a subsequent conveyance for valuable consideration was made, if such subsequent conveyance was made after June 28, 1893.

Purchasers under these Acts have been held to be such as claim under a post-nuptial settlement made in pursuance of ante-nuptial articles, or of an additional portion (*k*), or under a post-nuptial settlement made in consideration of the wife joining to destroy an ante-nuptial settlement (*l*), a husband who gives up his interest in his wife's estate (*m*), also mortgagees (*n*), lessees, and purchasers under an ante-nuptial settlement. The favour and regard evinced by the law towards marriage are at this point conspicuous; for it is now "settled that if the husband or wife, each of them having interests, no matter how much, or of what degree, or of what quality, come to an agreement which is afterwards embodied in a settlement, that is a bargain between husband and wife which is not a transaction without valuable consideration" (*o*). This exposition of the law was quoted by Jessel, M.R., with approval, in *Re Foster and Lister* (*p*). A post-nuptial bargain between husband and wife, in which both give up something in order to make a re-settlement, is not voluntary and void under this statute (*q*). Though a limitation in a marriage settlement in favour of a widower's children is voluntary and void against a purchaser (*r*), yet a settlement by a widower on his second marriage, in which he assigned to his son by a former marriage certain freeholds on trust for himself for life, and after death for his said son, was upheld as being for valuable consideration on the ground of responsibility for the payment of rent, &c. (*s*).

To enable volunteers, such as children of a former marriage,

(*i*) Sect. 173.
(*k*) *Dundas* v. *Dutens*, 2 Cox, 235; *Ex parte Stuckey*, 2 Cox, 284.
(*l*) *Scott* v. *Bell*, 2 Lev. 70.
(*m*) *Hewison* v. *Negus*, 22 L. J. Ch. 655; 1 W. R. 262.
(*n*) *Dolphin* v. *Alyward*, L. R. 4 H. L. 486.
(*o*) Per Bacon, V.-C., in *Teasdale* v. *Braithwaite*, 4 Ch. D. 85, 90; 46 L. J. Ch. 725, affirmed on appeal, 5 Ch. D. 630.
(*p*) 6 Ch. D. 87; 46 L. J. Ch. 480, in which he disapproved of *Butterfield* v. *Heath*, 22 L. J. Ch. 270; 15 Beav. 408.
(*q*) *Schreiber* v. *Dinkel*, 54 L. T. 911.
(*r*) *Re Cameron and Wells*, 37 Ch. D. 32; 57 L. T. 645.
(*s*) *Price* v. *Jenkins*, 5 Ch. D. 619; 46 L. J. Ch. 805.

under a post-nuptial settlement to enforce the trusts such trusts must have been perfected; and the Court will refuse to perfect executory trusts in their favour, though valuable consideration has moved between the parties to the settlement; but where the settlement can be said to be for valuable consideration as regards the collaterals, then the Court will interfere on their behalf (*t*). But where the limitations in favour of volunteers are intended by the settlor to be covered by those limitations in favour of those who are within the marriage consideration, so that the latter cannot take effect without also giving effect to the former, then in such case the limitations in favour of collaterals or volunteers can be enforced by them and are good as against purchasers or assignees for value (*u*). But a mere special agreement between the parties to a marriage settlement, acceptance by one of the parties of different interests in the settled property from those which the law would have given, and omission to provide for all or some of the issue of the marriage, are insufficient to support a mere limitation in favour of the settlor's illegitimate child and his issue (*x*). It is not necessary that under all circumstances the consideration should be pecuniarily adequate, or that it should appear on the face of the document if the fact of its existence can be proved (*y*), except in the instance of an ante-nuptial promise by an infant, which must appear in the post-nuptial settlement, for the purpose of ratification by him under Lord Tenterden's Act (*z*).

Settlements affected by the Bankruptcy Acts, 1883 and 1914 (*a*). Settlements affected by the Bankruptcy Act, 1869 (*b*), were confined to those made by *traders* only, but by the more recent Act the distinction between traders and non-traders is abolished and the settlements of both classes of persons are to be construed alike (*c*). Section 47 of the Act of 1883 is re-enacted by section 42 of the 1914 Act, and provides that

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(*t*) *Green* v. *Patterson*, 32 Ch. D. 95; 56 L. J. Ch. 181.

(*u*) *De Mestre* v. *West*, [1891] App. Cas. 264; 60 L. J. P. C. 66; and see *Mackie* v. *Herbertson*, 9 App. Cas. 303.

(*x*) *De Mestre* v. *West* (*ubi sup.*).

(*y*) *Bayspoole* v. *Collins*, L. R. 6 Ch. App. 228.

(*z*) *Trowell* v. *Shenton*, 8 Ch. D. 318; 47 L. J. Ch. 738.

(*a*) 46 & 47 Vict. c. 52, and 4 & 5 Geo. V. c. 59.

(*b*) 32 & 33 Vict. c. 71, s. 91.

(*c*) This Act is, however, not retrospective, and the former distinction between traders and non-traders will be preserved in regard to voluntary settlements made before the Act came into force (January 1, 1884). From and after this date the law is common to both, and the effect of the decisions in cases concerned only with traders under 32 & 33 Vict. c. 71, s. 91, will now be applicable to non-traders as well.

"Any settlement of property *not being a settlement made before and in consideration of marriage*, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in bankruptcy, unless the parties claiming under the settlement can prove that the settlor was, at the time of the making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof."

It seems if there is sufficient valuable consideration for the settlement it cannot be impeached under this section (*d*). If the purchaser act in good faith that is sufficient, and it is not necessary that both parties to the transaction should act in good faith (*e*). A settlement is void under this section, if the amount put into settlement is such as to leave the settlor, at the time of its execution, unable to pay his debts in full without it (*f*), or if he cannot pay his debts in the way in which he proposes to pay them, namely, by continuing his business (*g*). The settlement to be impeached must be one which passes the property to persons other than the settlor, and not one which leaves the settlor still able to pay his debts, though his means of paying them may be in part derived from the interest he takes under the settlement (*h*). Under sub-section 2 of section 42, which re-enacts section 13, sub-section 2 of the Bankruptcy Act of 1913, future property, other than money or property of a husband in right of his wife, covenanted or contracted to be settled (*i.e.*, property not in the settlor's possession at the time of marriage) must be actually transferred or paid over by the settlor before becoming bankrupt, or such covenant or contract will become void. The date of "becoming bankrupt" is the earliest to which the title of the trustee in bankruptcy relates back (*i*).

(*d*) *Re Tetley, Ex parte Jeffery*, 66 L. J. Q. B. 111.

(*e*) *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505; 64 L. J. Ch. 274. In this case the wife, who was possessed of separate property after marriage, allowed that property to pass into her husband's hands, who, having applied part of it to his own use, settled the residue of it, together with other property of his own, upon trusts, under which he took a life interest, with a proviso for the cessor of his interest in the event of his bankruptcy, and it was held that the proviso was good.

(*f*) *Ex parte Huxtable, Re Conibeer*, 2 Ch. D. 54; 45 L. J. Bk. 59.

(*g*) Per Lindley, L.J., in *Ex parte Russell, Re Butterworth*, 19 Ch. D. 588; 51 L. J. Ch. 521.

(*h*) *Re Lowndes*, 18 Q. B. D. 677; 56 L. J. Q. B. 425.

(*i*) *Re Reis, Ex parte Clough*, [1904] 1 Ch. 451; 73 L. J. Q. B. 929; affirmed *sub nom. Clough* v. *Samuel*, [1905] A. C. 442.

The effect of section 47 of the Bankruptcy Act, 1883, was retrospective as to traders, but not as regards non-traders, who were for the first time made liable to its provisions (*k*). Where a voluntary settlement of property is declared void against a trustee in bankruptcy under this section, the avoidance only operates to the amount of the debts and costs of the bankruptcy, and the surplus reverts to the trustees of the settlement (*l*).

Married Women and Bankruptcy.—By the Bankruptcy Act, 1914, a married woman who carries on a trade or business, whether separately from her husband or not, shall be subject to the bankruptcy laws as if she were a *feme sole* (*m*), and in consequence a married woman trader may generally be said to be now amenable to the bankruptcy laws as though she were a single woman or a man; and her settlements will be set aside if they infringe the bankruptcy laws, *e.g.*, a settlement of her property upon herself to be defeasible upon her bankruptcy, for by the Married Women's Property Act, 1882, "no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors" (*n*). Since a married woman trader is made liable to bankruptcy, her property acquired during coverture will become assets in the hands of her trustee in bankruptcy. If she is in trade at the time of her marriage, a covenant for the future settlement of her after-acquired money or property, on her becoming bankrupt, will be held void against her trustee in the bankruptcy (*o*).

A trustee of a voluntary marriage settlement is not a "purchaser" within the meaning of the Bankruptcy Acts (*p*). But where a settlor in pursuance of an arrangement with his father, and to secure a provision for his children, settled property on trustees for the benefit of his children, and became bankrupt within two years, the settlement was upheld, on the ground that the father was a purchaser for valuable consideration (*q*). So, too, where a woman, married in 1864, on subsequently becoming entitled to money under the wills of her father and grandfather,

(*k*) See *Ex parte Todd, Re Ashcroft*, 19 Q. B. D. 186; 56 L. J. Q. B. 431.
(*l*) *Re Sims, Ex parte Sheffield* v. *Prince*, 45 W. R. 189.
(*m*) 4 & 5 Geo. V. c. 59, s. 125 (1).
(*n*) 45 & 46 Vict. c. 75, s. 19.
(*o*) See 4 & 5 Geo. V. c. 59, s. 42 (2).
(*p*) *Ex parte Hillman, Re Pumfrey*, 10 Ch. D. 622; 48 L. J. Bk. 77.
(*q*) *Hance* v. *Harding*, 20 Q. B. D. 732; 57 L. J. Ch. 403.

lent the money to her husband for the purpose of his business upon the terms of his executing a settlement of the money upon her, the settlement was held not to be fraudulent, there having been good consideration in the fact that the wife waived her equity to a settlement (*r*). A voluntary settlement of personal chattels must be duly attested and registered as a bill of sale within seven clear days after its execution, otherwise such bill of sale will be void (*s*).

The operation of the Bankruptcy Acts relieves the Court from inquiring into questions of *mala fides*, or fraud, and enables it simply to inquire whether at the date of the settlement the settlor was able to pay his debts (*t*).

Settlements in the Divorce Court.—All the earlier legislation on this subject is repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, to which reference must now be made for the powers exerciseable by the Court. Where a decree for divorce or for judicial separation is pronounced by reason of the wife's adultery, and the wife is entitled to any property either in possession or reversion the Court may order such settlement as it thinks reasonable for the benefit of the innocent party and of the children of the marriage or any or either of them. Such instrument shall be valid notwithstanding coverture at the time of execution (*u*). Further, the Court after pronouncing a decree for divorce or for nullity of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements, and may make such orders with reference to the application of the settled property for the benefit of the children of or the parties to the marriage as the Court thinks fit, and the Court may exercise such powers notwithstanding that there are no children of the marriage (*uu*). These terms follow the enlargement made by the Matrimonial Causes Act of 1859 of the powers given under the Act of 1857, and as was said by Lindley, L.J., in reference to the Act of 1859 the terms enable the Court in cases falling within the section to override clauses against anticipation (*x*). The Court appears to have jurisdiction to entertain a petition to vary a

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(*r*) *Re Home, Ex parte Home*, 54 L. T. 301.
(*s*) 41 & 42 Vict. c. 31, s. 4; 45 & 46 Vict. c. 43, ss. 8, 15; *Re Count D'Epineuil*, 20 Ch. D. 217; *Fowler* v. *Foster*, 5 Jur. (N.S.) 99; 28 L. J. Q. B 210; and see *Swift* v. *Pannell*, 24 Ch. D. 210.
(*t*) *Ex parte Huxtable, Re Conibeer*, 2 Ch. D. 54; 45 L. J. Bk. 59.
(*u*) Sect. 191 (1).
(*uu*) Sect. 192.
(*x*) *Michell* v. *Michell*, [1891] P. 208; *Merton* v. *Merton*, 83 L. T. 223.

settlement by either party to the suit (*y*). Where once the Court has made an order varying the settlement, an application to vary it further will not be entertained (*z*), except in respect of matters which existed before the order was made (*a*). This power formerly could only be put in force where there were children of the marriage (*b*). The Divorce Court now has jurisdiction over marriage settlements where there are no children; but both husband and wife must be alive at the time of the application to vary (*c*). The Court has also power in reference to deeds of separation (*d*). This power can be put in force by the Court on a decree of nullity (*e*), and extends to all classes of nullity cases (*f*). The Court has jurisdiction before pronouncing a final decree for dissolution of marriage or judicial separation for adultery against a wife, to direct an inquiry as to her property, so that it may be enabled to order a settlement to be made of such property as soon as the final decree is pronounced (*g*). The application to vary a settlement is a separate proceeding consequential on and not part of a suit for dissolution (*h*). The principles that underlie the exercise of the statutory power of variation are the preserving the rights and liabilities of the wronged and wrongdoing spouses, and the safeguarding the interests of society and public morality; consequently, though the Court can exercise its discretion in varying the settlement to the advantage of a wrong-doing petitioner (*i*), yet, as a rule, where a petitioner has been guilty of marital infidelity or other offence, the discretion of the Court will not be exercised in favour of such petitioner (*k*). The

(*y*) *Wootton-Isaacson* v. *Wootton-Isaacson*, [1902] P. 146; 71 L. J. P. 80. There is nothing in the language of the section which would cut down the power of the Court to the case of the innocent party only. *Suart* v. *Suart* (*otherwise Hodgson*), [1910] P. 246. The Court can exercise this jurisdiction over the interests of parties other than the spouses or children of the marriage if they consent. See *Morrissey* v. *Morrissey*, [1905] P. 90; 74 L. J. K. B. 11. This section only deals with settled and not unsettled property. *Allcard* v. *Walker*, [1896] 2 Ch. 369; 65 L. J. Ch. 660.

(*z*) *Benyon* v. *Benyon*, 15 P. D. 54; 59 L. J. P. 39.

(*a*) *Gladstone* v. *Gladstone*, 1 P. D. 442; 45 L. J. P. 82.

(*b*) *Graham* v. *Graham*, L. R. 1 P. & D. 711.

(*c*) *Thomson* v. *Thomson and Rodschinka*, [1896] P. 263; 65 L. J. P. 65.

(*d*) *Worsley* v. *Worsley*, L. R. 1 P. & D. 648; 38 L. J. P. M. & A. 48.

(*e*) *A.* (*otherwise M.*) v. *M.*, 10 P. D. 178; 54 L. J. P. 31; *Leeds* v. *Leeds*, 57 L. T. 373.

(*f*) *Dormer* (*otherwise Ward*) v. *Ward*, [1901] P. 20; 69 L. J. P. 144.

(*g*) *Midwinter* v. *Midwinter*, [1892] P. 28; 61 L. J. P. D. 1.

(*h*) See *Stanhope* v. *Stanhope*, 11 P. D. 103; 55 L. J. P. 36; and *Thomson* v. *Thomson*, [1896] P. 263; 65 L. J. P. 65.

(*i*) See *Symons* v. *Symons*, [1897] P. 167.

(*k*) Per Court of Appeal in *Constantinidi* v. *Constantinidi and Lance*, [1905] P. 253; 74 L. J. P. 122; *Clarke* v. *Clarke and Lindsay*, [1911] P. 186; 80 L. J. P. 135.

Court can order a sum to be paid out of the *corpus* of the settled property for costs (*l*), and the Court has also overridden the restraint on anticipation (*m*).

Interests of Children.—In this matter the interests of the children (if any) are also largely considered (*n*), and a settlement cannot be varied so as to deprive a child of the marriage of an interest under it (*o*); and the interests of other parties will also be safeguarded (*p*). In giving effect to its powers, where the breaking up of the family life has been caused by the respondent, the Court ought to place the petitioner and the children in a position as nearly as circumstances will permit the same as if the family life had not been broken up (*q*). Thus, under certain circumstances, the Court will exercise a power of appointment in favour of the petitioner, though thereby the interests of the children of the marriage will be postponed until after the death of both their parents, on the assumption that if the family life had continued the respondent would have exercised that power in favour of the petitioner (*r*); and the Court has varied a settlement by depriving the infant children of the marriage of part of their interests secured to them by it; but, on the other hand, their interests in the remainder were accelerated by another act of the Court (*s*). The Court has also exercised jurisdiction in favour of the petitioner, even where a child of the dissolved marriage has acquired a vested interest in the settled funds (*t*). There is power in the Court where the husband is the guilty party to make provision for the custody, maintenance, and education of children above the age of sixteen, that is, till they attain the age of twenty-one (*u*).

Dum Casta Clause. -The Court will also take precautions,

(*l*) *Douglas* v. *Douglas*, 74 L. T. 384.

(*m*) *Churchward* v. *Churchward*, [1910] P. 195; 79 L. J. P. 59.

(*n*) *Paul* v. *Paul*, L. R. 2 P. & D. 93. See *Douglas* v. *Douglas* (*ubi sup.*).

(*o*) *Crisp* v. *Crisp*, L. R. 2 P. M. & D. 426.

(*p*) *Smith* v. *Smith and Graves*, 12 P. D. 102; 56 L. J. P. 51. The interests of the next-of-kin have been recognized. See *Walpole* v. *Walpole*, [1901] P. 196; 70 L. J. P. 49.

(*q*) See *Crisp* v. *Crisp* (*ubi sup.*); *Noel* v. *Noel*, 10 P. D. 179; 54 L. J. Ch. 73; *Forsyth* v. *Forsyth*, [1891] P. 363; 61 L. J. P. 13; *Pollard* v. *Pollard*, [1894] P. 172; 63 L. J. P. 104; *Hartopp* v. *Hartopp and Akhurst*, [1899] P. 65; 68 L. J. P. 33.

(*r*) *Hartopp* v. *Hartopp and Akhurst* (*ubi sup.*).

(*s*) *Whitton* v. *Whitton*, [1901] P. 348.

(*t*) *Blood* v. *Blood*, [1902] P. 190; 71 L. J. P. 97.

(*u*) *Thomasset* v. *Thomasset*, [1894] P. 295; 63 L. J. P. 140, overruling *Blandford* v. *Blandford*, [1892] P. 148; 61 L. J. P. 97, and other cases. *Thomasset* v. *Thomasset* was decided under 20 & 21 Vict. c. 85, s. 35.

as much as possible, to prevent the innocent party from being damnified by the dissolution of the marriage (*x*); thus an innocent party will be relieved from a covenant to appoint in favour of the guilty (*y*). Where the innocent party has not brought anything in to settlement, he or she will, if possible, be allowed a sum for maintenance on the dissolution of the marriage (*z*). The Court will not, as a rule, insert a *dum casta vixerit* clause in its order (*a*), and will not at the instance of the guilty husband, who has been deprived of interest in property brought in by the wife (*b*), but will insert it whenever it thinks the character of the woman warrants it in so doing (*c*). This power of variation can only be exercised on the application of one of the parties themselves, and the personal representative of either party cannot enforce it (*d*). A post-nuptial absolute assignment of property by a husband on his wife is not a "settlement" within the meaning of the Acts, and there is no jurisdiction to vary it even on nullity being decreed (*e*).

Restitution of Conjugal Rights.—Where the application for restitution is made by the husband the Court may order a settlement of the property of the wife, or of part of the wife's profits of trade or earnings to be periodically paid to the petitioner, for his own benefit or the benefit of the children of the marriage (*f*). The Court may in its discretion, taking into consideration the general conduct of the parties, order a settlement out of her property for the benefit of the husband (*i*); but such property must not be subject to a restraint upon anticipation (*k*).

On Judicial Separation.—But in a case of judicial separation there is no such power in the Court, and the settlement, antenuptial or post-nuptial, remains binding (*l*), though it has the power to order the payment of alimony (*m*), and a settlement

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(*x*) *Maudslay* v. *Maudslay*, 2 P. D. 256; 47 L. J. P. D. & A. 26; *Noel* v. *Noel*, 10 P. D. 179; 54 L. J. Ch. 73.
(*y*) *Benyon* v. *Benyon and O'Callaghan*, 1 P. & D. 447; 45 L. J. P. D. & A. 93.
(*z*) *March* v. *March and Palumbo*, L. R. 1 P. 437; 36 L. J. P. M. & A. 65.
(*a*) *Harrison* v. *Harrison*, 12 P. D. 130; 56 L. J. P. 76.
(*b*) *Gladstone* v. *Gladstone*, 1 P. D. 442.
(*c*) *Kettlewell* v. *Kettlewell*, [1898] P. 138; 67 L. J. P. 16.
(*d*) *Thomson* v. *Thomson*, [1896] P. 263; 65 L. J. P. 65.
(*e*) *Chalmers* v. *Chalmers*, 68 L. T. 28; *Hubbard* v. *Hubbard*, [1901] P. 157; 70 L. J. P. 34.
(*f*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 191 (2).
(*h*) 47 & 48 Vict. c. 68, s. 3.
(*i*) *Swift* v. *Swift*, [1891] P. 129; 60 L. J. P. 14.
(*k*) *Michell* v. *Michell*, [1891] P. 208.
(*l*) *Gandy* v. *Gandy*, 7 P. D. 168; 51 L. J. P. & D. 41.
(*m*) 20 & 21 Vict. c. 85, s. 17.

of the wife's property, if she be in the wrong (*n*); but if the parties have agreed by a deed in the nature of a settlement, one to pay and the other to accept a certain sum in the nature of alimony, it is not in the power of the Court on a decree of judicial separation to alter or vary the terms of the deed, and the parties remain bound by their contract, though the Court may be of opinion that the amount agreed between the parties is insufficient (*o*). Until a decree has been made for dissolution of a marriage, there is no *lis pendens* with reference to the property included in the settlements, so that up to the pronouncing of the decree *nisi* a party has power to charge his or her interest under the settlement (*p*).

Alimony.—Alimony is the allowance which the Court orders to be made to the wife when cohabitation has ceased, and is either *pendente lite* or permanent. The Court keeps a direct control over the sum it has ordered to be paid as alimony, whether *pendente lite* (*q*), or on pronouncement of a dissolution of marriage (*r*), and will reduce the amount where the husband's means are reduced, or increase the amount if his means have increased (*t*). When once the Court has ordered a husband to pay alimony to his wife, he cannot discharge himself of his duty to pay it, except by an order of the Court; it has, therefore, been held not to be a debt within section 30 of the Bankruptcy Act, 1914; and because it is not such a debt, and because it cannot be fairly estimated or valued for proving purposes, the bankruptcy of the husband does not discharge his liability to pay it, whether in respect of arrears (*x*) or of future payments (*y*). But alimony is a debt within the meaning of section 5 of the Debtors Act, 1869 (*z*), so as to render the husband liable for commitment for non-payment of it, if of ability to do so (*a*). The usual test for ascertaining the amount of the alimony where the wife is the innocent party

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(*n*) 20 & 21 Vict. c. 85, s. 45. See *Midwinter* v. *Midwinter*, [1892] P. 28; 61 L. J. P. & D. 1.

(*o*) *Gandy* v. *Gandy* (*ubi sup.*).

(*p*) *Wigney* v. *Wigney*, 7 P. D. 228; 51 L. J. P. M. & A. 84.

(*q*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (3); *Bailey* v. *Bailey*, 13 Q. B. D. 855; 53 L. J. Q. B. 583.

(*r*) *Ibid.* s. 191 (1).

(*t*) *Ibid.* s. 190; *Hall* v. *Hall*, [1915] P. 105.

(*x*) *Re Hawkins, Ex parte Hawkins*, [1894] Q. B. 25; *Kerr* v. *Kerr*, [1897] 2 Q. B. 439; 66 L. J. Q. B. 838. In *Ex parte Hawkins* the arrears had accrued due *after* the making of the receiving order; in *Kerr* v. *Kerr*, *before* the making of the order.

(*y*) *Linton* v. *Linton*, 15 Q. B. D. 239; 54 L. J. Q. B. 529.

(*z*) 32 & 33 Vict. c. 62.

(*a*) *Linton* v. *Linton* (*ubi sup.*).

is what would have been an adequate jointure for the woman as a widow, taking the pecuniary position of the parties into consideration (*b*). It is usually one-third of the husband's income, though sometimes less (*c*), and sometimes a greater amount; and regard is had to whether it is from a commercial source and therefore liable to fluctuation, but the wife having consented to a smaller amount previously is not a reason for reducing the alimony (*d*). The wife may recover from her husband's estate after his death where the estate is solvent (*e*).

The Court has power to entertain a petition for variation of settlements, though the parties were domiciled in Scotland at the time of the marriage, and the settlements were made in Scotch form (*f*); but it has no power to entertain such a petition except upon a decree absolute of dissolution or nullity pronounced by itself (*g*).

Discharge of Trustees.—The Settled Land Act, 1925 (*h*), makes provision on the termination of a settlement for the execution by the persons who in the last vesting instrument, or in the last indorsement thereon, are declared to be the trustees of the settlement, at the cost of the trust estate, of a deed declaring that they are discharged from the trust, so far as regards land which has become free from all equitable interests and powers under a trust instrument. In the event of the trustees refusing to execute the deed, the Court may be applied to for an order discharging them (*i*).

(*b*) *Kettlewell* v. *Kettlewell*, [1898] P. 138; 67 L. J. P. 16; *Hulton* v. *Hulton*, [1916] P. 57; 85 L. J. P. 137.
(*c*) *Leslie* v. *Leslie*, [1908] P. 99.
(*d*) *Dean* v. *Dean*, [1923] P. 172.
(*e*) *Re Stillwell, Brodrick* v. *Stillwell*, [1916] 1 Ch. 365.
(*f*) *Nunneley* v. *Nunneley*, 15 P. D. 186; *Forsyth* v. *Forsyth*, [1891] P. 363; 61 L. J. P. 13; *Montgomery* v. *Zarifi* (1918), W. N. 233; 119 L. T. 380.
(*g*) *Moore* (f. c. *Bull* v. *Bull*, [1891] P. 279; 60 L. J. P. 76.
(*h*) 15 Geo. V. c. 18, s. 17 (1).
(*i*) Sect. 17 (2).

CHAPTER VII.

PERSONAL RIGHTS OF THE SPOUSES CREATED BY COVERTURE.

This chapter deals with the rights and liabilities of husband and wife in relation to each other after a valid ceremony of marriage has been completed between them. At the outset it may be remarked that the status of the woman is more affected than that of her husband. Even in modern times, when every sexual inequality is attempted to be set aside and removed, this still holds good, and a woman on her marriage, except in a few instances (*a*), is content in this country to take her husband's name.

Maintenance.—It is the duty of the husband to maintain his wife, according to his condition or estate in life, or according to his means of supporting her (*b*).

This duty ceases if his wife leaves him without his consent in circumstances which do not justify her in living apart, and in any case if she commits adultery, though the husband may have been guilty of cruelty or other misconduct (*c*).

A wife is under no duty or obligation, as a general rule, to support her husband; but if she has separate property, and her husband becomes chargeable to any union or parish, a Court of summary jurisdiction has the same power, on the application of the guardians of the poor, to make an order on her for his maintenance out of her separate property, as it would have to make an order against the husband if the wife had become chargeable (*d*).

The Married Women's Property Act, 1908, provides that married women having separate estate shall be liable for the maintenance of their parents (*e*).

(*a*) Widows of high rank, on marrying again men of inferior rank to their late husbands, are by courtesy allowed to retain their names.

(*b*) *Johnson* v. *Summer* (1858), 3 H. & N. 261; 27 L. J. Ex. 341. See also *Shaftesbury Union* v. *Brockway*, [1913] 1 K. B. 159; 82 L. J. K. B. 222, as to the wilful neglect of a husband to maintain his wife where a separation order has been granted to the wife; *Balfour* v. *Balfour*, 63 S. J. 661; 35 T. L. R. 609—C. A.

(*c*) *Govier* v. *Hancock* (1796), 6 Term Rep. 603; *Wickens* v. *Wickens* (*No.* 2), [1918] P. 282—C. A.; 87 L. J. P. 169.

(*d*) 45 & 46 Vict. c. 75, s. 20.

(*e*) 8 Edw. VII. c. 27.

Domicil.—The husband has the choice of the matrimonial domicil. The domicil of the wife becomes that of the husband at the moment of marriage (*f*), and continues to be the same as her husband's, and changes with his throughout their married life (*g*). But the change must be carried out with an honest purpose, and with no intention of obtaining increased rights over her property, and must not be such as would visit her with unnecessary hardships, or be likely to imperil her life or liberty (*h*). The wife, it would seem, cannot acquire a separate domicil from her husband, though she live apart from him, or has separated from him judicially (*i*); or privately because of his gross misconduct (*k*); and she certainly cannot, where she elects merely to live apart from him; but it seems she may acquire a separate *quasi*-domicil from him in order to institute divorce proceedings, and that by a residence short of actual domicil (*l*), also if she is deserted by him (*m*). A married woman's testamentary capacity as to movables depends always, and for the alienation of her movables generally, on the law of her domicil (*n*).

Unity of the Spouses.—By the theory of the common law of England husband and wife are one person—*vir et uxor sunt quasi unita persona, quia caro una et sanguis unus* (*o*). This theory was never carried out to its fullest extent (*p*); it was the individuality of the wife that was in part suspended during the existence of the marriage tie. While that lasts she is under the *coverture* or protection of her *baron* or husband; in legal language, she is *femina co-operta* or *feme covert* (*q*). Coverture created disabilities at common law, and husband and wife could

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(*f*) See *Viditz* v. *O'Hagan*, [1900] 2 Ch. 87; 69 L. J. Ch. 507.

(*g*) *Warrender* v. *Warrender*, 2 Cl. & F. 488; *Dolphin* v. *Robins*, 7 H. L. Cas. 390; 29 L. J. P. & M. 11; *Re Daly's Settlement*, 25 Beav. 456; 27 L. J. Ch. 751; 33 & 34 Vict. c. 14, s. 10 (Naturalization Act, 1870).

(*h*) To what extent the law of the husband's domicil irrevocably governs the proprietary rights of the spouses, see *De Nicols* v. *Curlier*, [1900] A. C. 21, 43; 69 L. J. Ch. 109, 680.

(*i*) *Dolphin* v. *Robins* (*ubi sup.*); *Le Sueur* v. *Le Sueur*, 1 P. D. 139; 45 L. J. P. D. & A. 73.

(*k*) *Yelverton* v. *Yelverton*, 29 L. J. P. M. & A. 34; 8 W. R. 134.

(*l*) *Deck* v. *Deck*, 29 L. J. P. M. & A. 129; *Niboyet* v. *Niboyet*, 4 P. D. 1; 48 L. J. P. D. & A. 1; reversing 3 P. D. 52; *Santo Teodoro* v. *Santo Teodoro*, 5 P. D. 79; 49 L. J. P. 20.

(*m*) *Le Sueur* v. *Le Sueur* (*ubi sup.*). (*n*) Dicey, Dom. 195.

(*o*) Bracton, lib. 5, fol. 416, Co. Litt. s. 291.

(*p*) See the first resolution of the majority of the judges in *Manby* v. *Scott*, 1 Sid. 109, to the effect that "marriage does not give the wife any innate and uncontrollable power to render the husband liable" on contracts entered into by her, which it would give her if the doctrine of the *unitas personarum* were carried to its logical and furthest conclusion.

(*q*) 1 Bl. Com. 442.

neither contract with nor make gifts to one another, ostensibly because the wife had no separate existence, but in reality because the husband on marriage took, *jure mariti*, all his wife's personal property, and consequently she could neither give him, nor contract to give him, what was already his own (*r*). But in equity her separate existence in respect of her separate estate was recognized, with respect to which she was competent to contract, not only with strangers, but her own husband (*s*). The effect of the Married Women's Property Act, 1882, is to enlarge the separate existence of the wife, so far as her proprietary rights are involved; but this alteration in the status of the wife would seem to be confined to her rights over property as between herself and her husband; but notwithstanding this Act, this merger is still recognized, especially as regards the relations of third persons with the spouses (*t*). Husband and wife cannot sue each other for tort (*u*). In a recent case it has been held that an action does not lie against a married woman at the suit of her husband claiming an injunction to restrain her from pledging his credit so as to cause him damage, there having been no prohibition by the husband, because the act of pledging another's credit so as to cause him damage gives rise to an action in tort; and by section 12 of the Married Women's Property Act, 1882, a husband cannot sue his wife in tort, and the Court will not grant an injunction restraining an act which does not give rise to a cause of action (*u*). Publication of a libel by a husband to his wife is no legal and sufficient publication on which to found an action (*x*). In one other respect their unity of person is still regarded in law; that is, the position of a woman who marries a peer of the realm. A woman who marries a peer becomes a peeress, entitled to the same dignity as her husband, and acquires all the rights and privileges of the peerage consistent with her sex (*y*). But

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(*r*) As regards the wife's real estate, her separate existence was clearly recognized by the Common Law. Land with its feudal incidents was all in all in earlier times, and personal property scarcely existed; consequently the wife's interest (and thereby the lord's) in the really valuable property which she brought to her husband was safeguarded.

(*s*) *Hewison* v. *Negus*, 16 Beav. 594; 22 L. J. Ch. 655; *Vansittart* v. *Vansittart*, 4 K. & J. 62; 27 L. J. Ch. 290; *Woodward* v. *Woodward*, 3 De G. J. & S. 672.

(*t*) See *Butler* v. *Butler*, 14 Q. B. D. 831; 16 Q. B. D. 374; 55 L. J. Q. B. 55; *Re Jupp*, *Jupp* v. *Buckwell*, 39 Ch. D. 148; 57 L. J. Ch. 774.

(*u*) *Webster* v. *Webster*, [1916] 1 K. B. 714; 85 L. J. K. B. 691. See also *Hulton* v. *Hulton*, [1917] 1 K. B. 813—C. A.; 86 L. J. K. B. 633.

(*x*) *Wennhak* v. *Morgan*, 20 Q. B. D. 635; 57 L. J. Q. B. 241.

(*y*) Per Barnes, J., in *Cowley* v. *Cowley*, [1900] P. 122; and see S. C. on appeal, [1901] A. C. 450; 70 L. J. P. 83.

notwithstanding the Sex Disqualification Removal Act, 1919 (*z*), the Committee of Privileges decided in *Lady Rhondda's Case* that she did not acquire, even as a peeress in her own right, the title to a seat in the House of Lords.

As regards their *personal* existence, it is not true, in a literal sense, to say that a man and wife became one person in the eye of the law, and their separate existence was recognized in many ways; thus, sending a communication libelling the husband to the wife was held to be a sufficient publication of the libel (*a*); so also, where the wife had an adverse interest to her husband, as, for instance, where she petitioned for a divorce, she might have made a binding agreement with him, notwithstanding coverture (*b*). She may exhibit articles of the peace against him if he ill-treats her and she has a reasonable fear of his violence (*c*).

Control and Custody of Wife.—By the law of England, as laid down by more modern authorities, a husband is entitled to a limited control and custody of his wife's person; but he cannot be convicted of a rape upon her (*d*); nor of an assault upon her if he infects her with a venereal disease (*e*). It was formerly laid down that "the husband hath by law power and dominion over his wife, and may keep her by force within the bounds of duty; and may beat her, but not in a violent or cruel manner" (*f*). The latter part of this proposition, if ever, strictly speaking, it was the law of this country, is long since exploded; and if a husband were thus to attempt to correct his wife, he would render himself liable to criminal proceedings; though it is true she cannot bring an action against her husband for damages for assault during the period of coverture (*g*); and

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(*z*) 9 & 10 Geo. V. c. 71.

(*a*) *Wenman* v. *Ash*, 13 C. B. 836. The distinction between this case and that of *Wennhak* v. *Morgan* (*ubi sup.*) is that in the latter the husband was the defendant, who was alleged to have published a libel by disclosing it to his wife, whereas in the former the statement defamatory of her husband was communicated to the wife by the defendant who was a stranger, and Maule, J., said: "In the eye of the law, no doubt, man and wife are for many purposes one; but that is a strong figurative expression and cannot be so dealt with as that all the consequences must follow which would result from its being literally true. For many purposes they are essentially distinct and different persons, and amongst others, for the purpose of having the honour and feelings of the husband assailed and injured by acts done or communications made to the wife."

(*b*) *Bateman* v. *The Countess of Ross*, 1 Dow, 235.

(*c*) *Shepherd* v. *Mackoul*, 3 Camp. 326; *Turner* v. *Rookes*, 10 A. & E. 47.

(*d*) 1 Hale, 629; but he may be convicted of criminally aiding and abetting a rape upon her. *Lord Audley's Case*, 3 St. Tr. 401.

(*e*) *Reg.* v. *Clarence*, 22 Q. B. D. 23; 58 L. J. Q. B. 10.

(*f*) Bacon's Abr., B. & F. (B.).

(*g*) *Phillips* v. *Barnet*, 1 Q. B. D. 440; 45 L. J. Q. B. 277.

the husband is also disentitled to bring a similar action against his wife (*h*). How far the first part of the above proposition, viz., that a "husband hath by law power and dominion over his wife, and may keep her by force within the bounds of duty," in other words, the right of the husband to the control and custody of his wife's person, is true, will be briefly discussed. Any right of custody lasts only till he has been guilty of cruelty towards her, or separation has taken place between them; and it is quite clear that any restraint he may put upon her must not tend to endanger her health or life, or render the cohabitation unsafe, for such conduct might be regarded as amounting to *sævitia* or cruelty, entitling her to a judicial separation (*i*).

His custody and control were never permitted to amount to imprisonment, though they might amount to confinement (*k*); though the distinction between the two forms of detention seems now too fine for practical working; and at the present time any distinction must be taken to be abolished (*l*). A husband may now detain his wife within the walls of the matrimonial domicil only when apprehensive of her doing some injury to his property or his honour (*m*). If the wife is unwilling to live with her husband, she may live apart from him, and he cannot now compel her either by decree of restitution of conjugal rights, (*n*) or by writ of *habeas corpus*, or by force (*o*), or by stratagem (*p*), to resume cohabitation. The husband is only entitled to his writ of *habeas corpus* when his wife is improperly detained out of his custody against her will, but not where he has abandoned his marital right by executing a separation deed (*q*); and if the deed be informal, he cannot justifiably enter the house of a third party to reclaim her as improperly harboured there, without having given notice of his revocation of the licence to live apart (*r*). If the husband treat his wife ill, he will not be entitled to his *habeas corpus* (*s*), or where his wife is living apart from him under no restraint (*t*). The wife,

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(*h*) *Phillips* v. *Barnet*, 1 Q. B. D. 440; 45 L. J. Q. B. 277.
(*i*) See *Re Cochrane*, 8 Dowl. P. C. 630.
(*k*) *Atwood* v. *Atwood*, Ch. Prec. 492; *Lord Leigh's Case*, 3 Keb. 433.
(*l*) *Reg.* v. *Jackson*, [1891] 1 Q. B. 671; 60 L. J. Q. B. 346; *Rex* v. *Mead*, 1 Burr. 542; *Reg.* v. *Leggatt*, 18 Q. B. 781; *Re Cochrane (ubi sup.)*.
(*m*) See *Reg.* v. *Jackson (ubi sup.)*; *Rex* v. *Lister*, 1 Stra. 478.
(*n*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 187 (1).
(*o*) *Reg.* v. *Jackson*, [1891] 1 Q. B. 671; 60 L. J. Q. B. 346.
(*p*) *Re Cochrane*, 8 Dowl. P. C. 630.
(*q*) *Anne Gregory's Case* (*Rex* v. *Brooke*, 4 Burr. 1991).
(*r*) *Lewis* v. *Ponsford*, 8 C. & P. 687.
(*s*) *Rex* v. *Brooke*, 4 Burr. 1991.
(*t*) *Ex parte Sandilands*, 21 L. J. Q. B. 342; 17 Jur. 317.

on the contrary, may have her writ if she be improperly restrained, as where she is confined to his house after a deed of separation has been executed between them (*u*); or where he has violently taken possession of her body, and keeps her detained against her will (*x*). Any ante-nuptial arrangement which would have the force of infringing the husband's rights to this control and custody can be set aside by him, and will not be enforced by the Courts. But the power of a husband over the person of his wife while in England is not affected by the law of his foreign domicil (*y*). A husband has no indefeasible right to be appointed committee of her person if she become lunatic (*z*).

Mutual Right of Cohabitation.—Husband and wife are mutually entitled to each other's society, in other words, to live together and cohabit as man and wife; for this right is the foundation of the married state, and even under the Poor Law they are not separated when they become paupers and chargeable to the poor rate (*a*). The cohabitation of man and wife is demanded by nature, not only for the engendering, but also for the protection and nurture of the offspring. Withdrawal from cohabitation merely on the ground of incompatibility of temper can scarcely ever be justified (*b*), and it is only by reason of some serious breach of duty towards one another that the spouses can properly live apart; and such breach is usually one that is nowadays cognoscible by the Divorce Court, whether entitling the injured party to a dissolution of marriage or a judicial separation. The spouses are entitled to protect each other's life and security, for they have a clear interest in each other's safety and comfort; and a husband or a wife may justify for killing in the moment of danger one who was threatening the life of the other; and it is the same with regard to a battery. A husband who is deprived of the society or *consortium* of his wife may maintain an action based upon its loss (*c*), and a wife who is deprived of the *consortium* of her husband by the wrongdoing of a third person may also be entitled

(*u*) *Rex* v. *Lister*, 1 Stra. 478; see also *Lord Vane's Case*, 8 East, 171 *n.*
(*x*) *Reg.* v. *Jackson* (*ubi sup.*).
(*y*) Dicey, Dom. 193.
(*z*) *Re Davy*, [1892] 3 Ch. 38; 61 L. J. Ch. 578.
(*a*) *Reg.* v. *Bridgnorth*, 9 Q. B. D. 765; 52 L. J. M. C. 17.
(*b*) *Yeatman* v. *Yeatman*, L. R. 1 P. & D. 489; 37 L. J. P. M. & A. 37.
(*c*) 3 Bl. Com. 140. The claim for loss of society must be limited to the life of the wife, and no further damages can be recovered for the fact that she has died in consequence of the tort. *Baker* v. *Bolton*, 1 Camp. 493. See also *Smith and Wife* v. *Selwyn*, [1914] 3 K. B. 98—C. A.; 83 L. J. K. B. 1339.

to maintain an action based on its loss (*d*). The husband and wife together may maintain the action, but where the facts disclosed in the statement of claim amounted to a charge of administering drugs to the woman with intent to have unlawful carnal connection with her the action was stayed until the defendant had been prosecuted (*e*).

Damages against Co-respondent. —Adultery committed with his wife was a wrong done to the husband which formerly entitled him to maintain an action for *crim. con.* against the adulterer for the purpose of obtaining damages; but the Divorce Act of 1857 (*f*) abolished that right of action, though by another section (*g*) it practically restored it, and the Supreme Court of Judicature Act, 1925, provides that: "A husband may on a petition for divorce or for judicial separation, or for damages only, claim damages from any person on the ground of adultery with the wife of the petitioner" (*h*); the chief difference between the old and present practice being that the injured husband has no longer recourse to the Common Law Courts for pecuniary damages against the adulterer, but can recover them in the same Court as that which gives him the further relief of dissolution of marriage or judicial separation. Where the husband's petition for divorce is dismissed on the ground of condonation, the husband is not entitled to damages against the adulterer (*i*). The wife neither before nor since the Divorce Acts could bring this action against the paramour of her husband; for before the Acts there is no trace of such an action, whether founded on the common law or the practice of the Ecclesiastical Courts; and since the Acts the substituted remedy of damages against the co-respondent is confined to the husband.

Enticing Away of Spouse.—The enticing away and harbouring of his wife is an injury to the husband which renders the offending person liable to an action (*l*), for the husband may recover her out of the possession of any person who is harbouring her, unless the husband has by his cruelty or misconduct

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(*d*) See *Lynch* v. *Knight*, 9 H. L. Cas. 577.
(*e*) *Smith and Wife* v. *Selwyn*, [1914] 3 K. B. 98.
(*f*) 20 & 21 Vict. c. 85, s. 59. (*g*) Sect. 33.
(*h*) 15 & 16 Geo. V. c. 49, s. 189 (7); *Bikker* v. *Bikker and Whitewood*, 67 L. T. 721. In this case it was held that the measure of damages is not the means of the co-respondent but the injury to the petitioner. See *Lord* v. *Lord and Lambert*, [1900] P. 297; 69 L. J. P. 54.
(*i*) *Bernstein* v. *Bernstein*, [1893] P. 262; 63 L. J. P. 3.
(*l*) *Winsmore* v. *Greenbank*, Willes, 577.

forfeited his marital rights, or turned her out of doors, or by some insult or ill-treatment compelled her to leave him (*m*), or she elects to live apart from him (*n*). The parents of the wife have no more right to entice away and harbour her than a complete stranger, though, where the husband is to blame, less misconduct on his part would justify a parent in receiving back a daughter than would justify a stranger. The inducement to leave the husband must be active on the part of the inducer; and if he merely expresses his approval of the wife leaving, such approval does not amount to an inducement or enticing away (*o*). In some of the United States it has been held that an action for enticing away a husband does not lie at the suit of a wife (*p*), but in many of the States of the Union this class of action has been held to be maintainable (*q*); and, although the wife failed to prove her case, it has now been held here that the cause of action on the part of the wife exists (*r*). Husband and wife cannot at all times insist upon this right of cohabitation as against each other; thus, the wife is not compelled to be with her husband during his imprisonment or banishment (*s*); or if he propose to take her where serious risks to her life would ensue. If the husband or wife wilfully abstain from each other's society, and refuse to cohabit, such conduct may be the ground of judicial separation, and the payment of a regular allowance is no answer (*t*); but mere temporary absence, whether for the purposes of trade or in the public service, is not inconsistent with this right of cohabitation.

Under Lord Campell's Act (*u*).—Either husband or wife may bring an action against a wrongdoer by whose negligence the death of the one has been caused, provided that it is brought within a year from the death, and the survivor can prove that pecuniary loss or damage has resulted from, or a reasonable expectation of pecuniary advantage has been defeated by, the death of the injured party (*x*). Sentimental damages (*y*), or

(*m*) *Philp* v. *Squire*, 1 Peake, 114; *Berthon* v. *Cartwright*, 2 Esp. 480.
(*n*) *Reg.* v. *Jackson*, [1891] 1 Q. B. 671; 60 L. J. Q. B. 346.
(*o*) *Smith* v. *Kaye*, 20 T. L. R. 261.
(*p*) *Van Arnam* v. *Ayers*, 67 Barb. 544.
(*q*) *Ex relatione* the late Chief Justice of Ontario (The Hon. G. W. Burton).
(*r*) *Gray* v. *Gee*, 39 T. L. R. 429.
(*s*) Co. Litt. 133.
(*t*) *Jackson* v. *Jackson*, [1924] P. 19; 93 L. J. P. 1.
(*u*) 9 & 10 Vict. c. 93, ss. 1, 2.
(*x*) *Ibid.*; Lord Campbell's Act. When there is no reasonable prospect of benefit accruing, see *Harrison* v. *London & North-Western Railway Co.*, 1 Cab. & El. 540.
(*y*) *Blake* v. *The Midland Railway Co.*, 18 Q. B. 93; 21 L. J. Q. B. 233.

funeral or mourning expenses (*z*), cannot be recovered. This remedy was given because at common law the death of a person cannot be made the subject of an action for damages (*a*). The benefit of Lord Campbell's Act is lost to her by her adultery (*b*). If a widow is a "dependant" of a workman whose death occurs during his employment, and who would be entitled to compensation if he had not died, she is entitled to compensation from the employer under the Workmen's Compensation Act, 1906 (*c*).

Actions for Tort.—Formerly a husband had an indefeasible interest in the personal wrongs or torts done to his wife, whether as to her person, *e.g.*, battery, or to her character and reputation, *e.g.*, libel or slander. If they were wrongs done to her *before* marriage, he might join with his wife in an action for their redress, and whatever damages might be recovered belonged to him (*d*). Where the wrongs were done *during* marriage, he must have joined with her in the action, for the wrong done to his wife was a wrong done to himself (*e*), and he also recovered for himself whatever damages might have been assessed (*f*).

But now, under the Married Women's Property Act, 1882, a married woman can sue alone, as though she were a single woman, for torts done to herself, and her husband need not be joined in the action, and damages recovered by her become her separate property (*g*), whether the cause of action arose before or after the Act (*h*). Spoken words imputing to her unchastity or adultery do not require special damage to be proved to make them actionable (*i*). In a case where the tort to the wife arises

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(*z*) *Dalton* v. *South-Eastern Railway Co.*, 27 L. J. C. P. 277; 4 C. B. (N.S.) 296.

(*a*) *Osborn* v. *Gillett*, L. R. 8 Ex. 88; 42 L. J. Ex. 53. See *post*, Part II., Parent and Child, chap. v.

(*b*) *Stimpson* v. *Wood*, 57 L. J. Q. B. 484; 36 W. R. 734.

(*c*) 6 Edw. VII. c. 58.

(*d*) *Dalton* v. *Midland Counties Railway Co.*, 22 L. J. C. P. 177; 4 C. B. N. S. 296. This right to sue on the part of the husband was a chose in action, and if the husband died before suit, the right survived to the widow.

(*e*) *Newton* v. *Hatten*, 2 Ld. Raym. 1208.

(*f*) The right of the husband to sue in this case was also a chose in action, and if the wife died during suit, the right survived to her administrator, who probably was her husband. In such actions, if the husband wished to recover special damages for the injury to his wife, he did not declare on the joint tort, but for the loss of his wife's society. *Dengate* v. *Gardiner*, 4 M. & W. 5.

(*g*) 45 & 46 Vict. c. 75, s. 1, sub-s. 2. For example, a married woman travelling on a railway meets with an accident resulting from the negligence of the company; she sues the company and recovers £500. Under this section that sum becomes her "separate property."

(*h*) *Weldon* v. *Winslow*, 13 Q. B. D. 784; 53 L. J. Q. B. 528. This was an action for assault and libel, in which the Act of 1882 was held retrospective as to procedure.

(*i*) 54 & 55 Vict. c. 51. But no more costs can be recovered under the Act

out of a breach of contract with the husband (as in *Longmeid* v. *Holliday* (*k*)) it is suggested that equally now as before the change of the law the joinder of the husband would be necessary in order to ensure success, for there is no misfeasance towards her independently of the contract with her husband (*l*).

Married Women and Criminal Law. Coercion.—Generally speaking, a married woman is just as amenable to the criminal law as regards her crimes and delinquencies as a man or a single woman; but she is excused from liability in respect of certain crimes when it is proved that she has been acting under the compulsion or coercion of her husband, on the ground that her acts have not been those of a free agent. When her husband is not present she will not be presumed to have acted under his coercion, even though he may be proved to have procured her to commit the offence (*m*). The mere fact of coverture does not raise the presumption of coercion by the husband (*n*); and if the husband is in the neighbourhood while the crime is being committed by the wife, it is a question for the jury whether she was taking an independent part (*o*).

The coercion must be active, for if the husband be incapable of coercing her, the presumption will not arise in her favour. Thus, if the husband were a cripple and confined to his bed, his presence at the committal of the offence would not be sufficient to exonerate the wife (*p*). The coercion of the husband must be proved by his presence at the commission of the offence (*q*). She is also fully responsible for crimes which she has committed alone, and which she has voluntarily committed (*r*), or which she is proved to have incited or procured her husband to commit, that is, she may be an accessory before the fact (*s*); and there are certain more serious offences, such as murder and treason (*t*), to the commission of which by her

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than damages, unless the judge certifies there was a reasonable ground for bringing the action.

(*k*) 6 Exch. 761; and see *George* v. *Skivington*, L. R. 5 Ex. 1; 39 L. J. Ex. 8.

(*l*) Unless the case would fall within the principle of *Longridge* v. *Levy*, 4 M. & W. 337, in which an allegation of fraud was sustained. In the United States, under such circumstances, the husband alone need sue. Bish. Laws M. W. sub-s. 275.

(*m*) *Rex* v. *Morris*, Russ. & Ry. 270.

(*n*) *Brown* v. *Att.-Gen. of New Zealand*, 77 L. T. 414.

(*o*) *Reg.* v. *Baines*, 69 L. J. Q. B. 681.

(*p*) *Reg.* v. *Pollard et uxor*, cited *Reg.* v. *Cruse*, 2 Moo. C. C. R. 53.

(*q*) *Rex* v. *Morris*, Russ. & Ry. 270.

(*r*) 4 Bl. Com. 29.

(*s*) 1 Hale, 516; 2 Hawk. P. C. c. 29, s. 24.

(*t*) Robbery has been also included, but with doubtful authority; see *Reg.* v. *Torpey*, 12 Cox, C. C. 45.

the coercion of her husband forms no defence. It is in the less heinous offences only that she can successfully set up this plea. This plea may also be set up in the offence of uttering counterfeit coin (*u*). But in the inferior misdemeanours the wife may be jointly indicted with her husband, as, for instance, for an assault (*x*), and for keeping a brothel (*y*), on the principle that it is an offence as to the government of the house, in which the wife has a principal share; and also such an offence as may generally be presumed to be managed by the intrigues of the sex. In one case where a married woman was indicted for falsely swearing herself to be next-of-kin and procuring administration, she was held guilty, though her husband was with her when she took the oath (*z*). Where a wife receives stolen property, it is necessary to show that she took an active part in the receipt, and if she only intended to conceal her husband's guilt, and to screen him from the consequences, it is different; so if she harbours her husband, or endeavours to conceal that which may lead to his apprehension, she ought to be acquitted (*a*). A married woman may be accessory after the fact to a felony committed by her husband, if she actively engage in the crime; but if she only receives, comforts, or relieves him, knowing him to have committed a felony, she will not thereby become an accessory after the fact (*b*). It is said that a husband and wife cannot be indicted for a conspiracy, because they are deemed to be as one person in law, and have but one will (*c*); but it is doubtful now whether that proposition would be held to be good law if it were shown that the agency of the wife was as active as that of the husband.

This protection is based upon presumption only, and may be rebutted by evidence to show that she has been acting voluntarily, and even taking the more active share in the offence (*d*), or by proving that the husband was a cripple and in bed at the time of the offence (*e*). The mere fact of his commanding her to commit the crime would be no excuse for her obeying his voice, and breaking the law (*f*). This defence does not cast upon the

(*u*) Steph. Dig. Cr. L. 18.
(*x*) *Reg.* v. *Cruse*, 2 Moo. C. C. R. 53.
(*y*) 1 Hawk. c. 1, s. 12.
(*z*) *Rex* v. *Dicks*, cited 1 Russ. Cr. 100.
(*a*) See *Reg.* v. *M'Clarens*, 3 Cox, C. C. 425.
(*b*) Steph. Dig. Cr. L. 27.
(*c*) 1 Hawk. P. C. c. 72, s. 8.
(*d*) *Reg.* v. *Smith*, 1 D. & B. 553.
(*e*) Per Tindal, C.J., in *Reg.* v. *Cruse*, 8 C. & P. 541.
(*f*) *Ibid.*

woman the burden of strict proof that she was the wife of the male prisoner (*g*), and in one case, where the man and the woman were proved to have lived together for several months, and to have a child with them which was said to be theirs, the woman was acquitted on the ground of coverture (*h*). A wife is not responsible for her husband's breach of duty (*i*).

In consequence of comments by Darling, J., in the case of *Rex* v. *Peel* on the presumption of coercion, a committee presided over by Avory, J., inquired into the question, and recommended that the defence of coercion should be available to a married woman subject to proof, thus abolishing the presumption. A bill to bring this recommendation into law twice passed in the House of Lords, but has not yet passed in the House of Commons.

The Legal Settlement of Wife under the Poor Law.—This is the last legal settlement of her husband, for his settlement is her settlement (*l*); but if he has no settlement, then upon his death her settlement before marriage revives. Thus, a wife who is made a widow by the death of her husband who has acquired a settlement during his life, retains her husband's settlement until she acquires one for herself, and is not disqualified from so retaining it by the effect of section 35 of the Divided Parishes Act, 1876 (*m*), for the status acquired by the woman in marriage does not terminate at the death of the husband (*n*). She takes the settlement for the time being of her husband, though she is living apart from him and cohabiting with another man (*o*). In cases where a husband has deserted his wife, or gone abroad and the place of his settlement is unknown, she will be removable to the place of her own settlement; unless she has acquired a status of irremovability for herself. Widows are not removable for twelve months after the death of their husbands if they remain unmarried (*p*); and where a wife is deserted by her husband, and then lives for one year in such a manner as would, if she were a widow, render her exempt from removal, she shall

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(*g*) *Reg.* v. *M'Ginnes*, 11 Cox, C. C. 391.
(*h*) *Reg.* v. *Torpey (ubi sup.)*.
(*i*) *Rex* v. *Squire*, cited 1 Russ. Cr. 96.
(*l*) See *Reg.* v. *Bridgnorth*, 9 Q. B. D. 765, 771.
(*m*) 39 & 40 Vict. c. 61.
(*n*) *Guardians of the Reigate Union* v. *Guardians of the Croydon Union*, and *Guardians of the Medway Union* v. *Guardians of the Bedminster Union*, 14 App. Cas. 465; 59 L. J. Q. B. 29.
(*o*) See *Guardians of Woolwich Union* v. *Guardians of Fulham*, [1905] 2 K. B. 203; 74 L. J. K. B. 556.
(*p*) 9 & 10 Vict. c. 66, s. 2.

be so exempt unless her husband return (*q*). The married woman in this manner acquires a settlement for herself (*r*). Gross misconduct which would entitle the husband to live apart from her does not confer this right upon her (*s*). A married woman, for the purposes of obtaining a status of irremovability for herself, can add to the portion of the statutory period of twelve months in which her husband (having no settlement of his own) has resided in a parish, and who has left her with an intention of returning, the remainder of the statutory period that she has resided by herself in the said parish (*t*).

The Franchise and Public Functions.—The Representation of the People Act, 1918 (*u*), s. 4, provides that: "(1) A woman shall be entitled to be registered as a Parliamentary elector for a constituency (other than a university constituency) if she—(a) has attained the age of thirty years; and (b) is not subject to any legal incapacity; and (c) is entitled to be registered as a local government elector in respect of the occupation in that constituency of land or premises (not being a dwelling-house) of a yearly value of not less than five pounds or of a dwelling-house, or is the wife of a husband entitled to be so registered.

(2) A woman shall be entitled to be registered as a Parliamentary elector for a university constituency if she has attained the age of thirty years and either would be entitled to be so registered if she were a man, or has been admitted to and passed the final examination, and kept under the conditions required of women by the university the period of residence, necessary for a man to obtain a degree at any university forming, or forming part of, a university constituency which did not at the time the examination was passed admit women to degrees.

(3) A woman shall be entitled to be registered as a local government elector for any local government electoral area:—

(a) where she would be entitled to be so registered if she were a man; and

(b) where she is the wife of a man who is entitled to be so registered in respect of premises in which they both reside, and she has attained the age of thirty years and is not subject to any legal incapacity."

(*q*) 24 & 25 Vict. c. 55, s. 3, as varied by 29 & 30 Vict. c. 113, s. 17. Barrett-Lennard, The Position in Law of Women, pp. 22, 23.

(*r*) *Bethnal Green Guardians* v. *Paddington Guardians*, [1912] 2 K. B. 335.

(*s*) *Reg.* v. *Cookham Union*, 9 Q. B. D. 522. But see *Reg.* v. *Maidstone Union*, 5 Q. B. D. 31; 49 L. J. M. C. 25.

(*t*) *Guardians of Tewkesbury Union* v. *Guardians of Birmingham*, [1904] 2 K. B. 395; 73 L. J. K. B. 797.

(*u*) 7 & 8 Geo. V. c. 64.

The Sex Disqualification (Removal) Act, 1919 (*x*), provides that: "A person shall not be disqualified by sex or marriage from the exercise of any public function, or from being appointed to or holding any civil or judicial office or post, or from entering or assuming or carrying on any civil profession or vocation, or for admission to any incorporated society (whether incorporated by Royal Charter or otherwise), and a person shall not be exempted by sex or marriage from the liability to serve as a juror."

The House of Lords Committee of Privileges has decided that this statute does not confer the right to take her seat in the House of Lords upon a woman who is a peeress in her own right.

Legacy to Wife.—The word "wife" in a testamentary gift to the wife of a particular person *prima facie* means the wife of the person who is alive at the time of the will and death of the testator (*y*).

(*x*) 9 & 10 Geo. V. c. 71, s. 1.
(*y*) *Re Coley, Hollinshead* v. *Coley*, [1903] 2 Ch. 102; 72 L. J. Ch. 502.

CHAPTER VIII.

PROPRIETARY RIGHTS OF THE SPOUSES CREATED BY COVERTURE.

The scope of this chapter is the interest of the spouses in their own and each other's property as affected by coverture. The chapter will be broadly divided into two sections: the first dealing with real property, including chattels real; and the second with personal property.

Marriage at Common Law operated as an absolute conveyance of the wife's personal property to the husband, and to give him an interest in her realty for his and her joint lives, or if entitled as tenant by the curtesy, an interest for his life. The real property of the married woman was upon a different footing from her personalty, and the husband never took a greater interest in it than for his life. This difference may be thus explained: Land, in former days the most valuable commodity, was often owned to a large extent by females, the interest of whose heirs was jealously guarded. Again, the principles of the tenure of land must be taken into consideration. The incidents and services of tenure in feudal times were most profitable, and jealously guarded by those entitled to exact them. The husband took a joint interest, or a full life interest, because he had to perform the requisite services in lieu of his wife, but he did not acquire the fee, not only because it would have broken the line of descent marked out by the original grant, but might have caused a serious infraction of the rights of the superior lord, who would have had a strange and possibly hostile family thrust upon him, and his services imperilled.

New Law of Inheritance.—To place husband and wife on an equal footing in respect of each other's property has been the modern tendency of the law (*a*). And this tendency has been carried still further by the Administration of Estates Act, 1925 (*b*).

Among the many changes effected by this Act is the entire revision of the rights of the surviving husband or wife on the death of the other intestate. In order to simplify the process of

(*a*) *Gordon* v. *Silber*, 25 Q. B. D. 491; 59 L. J. Q. B. 507.
(*b*) 15 Geo. V. c. 23.

attaining the new equality of rights between them with regard to the real estate or personal inheritance of every person dying after the commencement of the Act (January 1, 1926), section 45, after abolishing generally all existing canons of descent, proceeds to abolish in detail tenancy by the curtesy and every other estate and interest of a husband in real estate as to which the wife dies intestate, and also dower and freebench, and every other estate and interest of a wife in real estate as to which the husband dies intestate. There is a proviso in favour of rights of freebench which have attached before the commencement of the Act on January 1, 1926, and which could not be barred by any disposition of the husband, unless such rights have been released, in which case they remain as an equitable interest. The Act does not affect the descent or devolution of entailed interests.

The Law of Property Act, 1922 (*c*), enacts that as from January 1, 1926, every parcel of copyhold land shall be enfranchised and cease to be of copyhold or customary tenure, subject to provisions as to compensation to be ascertained and paid within a period of five years. The 12th Schedule to the Act, in setting out the effect of enfranchisement, provides that the land shall not be subject to any custom relating to dower or freebench or tenancy by the curtesy, but shall be governed as to descent on death and intestacy or partial intestacy and devolution on death by the provisions of Parts VIII. and IX. of the Act, since repealed and replaced by section 46 of the Administration of Estates Act, 1925 (*d*). A similar proviso is contained in section 1 (d) to the 12th Schedule in relation to enfranchised land as in relation to real estate, namely, that nothing in this paragraph with respect to dower, freebench or curtesy shall apply to any person married before January 1, 1926, unless in the case of dower or freebench the husband dies after that date, and in the case of curtesy the wife dies after that date, but where a right to freebench has attached before that date which cannot be barred by a testamentary or other disposition made by the husband, then such right shall unless released remain in force in equity. Section 2 of the same Schedule provides that enfranchisement is not to affect the rights or interests of any person in the enfranchised land under a will, settlement, mortgage, or otherwise, by purchase, but those rights and interests shall

(*c*) 12 & 13 Geo. V. c. 16, s. 128.

(*d*) 15 Geo. V. c. 23. See *post*, chap. ix., p. 201, for the provisions of this section.

(subject to the provisions of Part I. of the Law of Property Act, 1925, as to what are henceforth to constitute legal estates, all other interests being converted into equitable interests) continue to attach upon the land enfranchised in the same way, as nearly as may be, as if the freehold land had been comprised in the instrument or disposition under which that person claims.

The rights of the surviving spouse which are abolished by this Act, therefore, are limited to the cases where death occurs after the commencement of the Act, *i.e.*, January 1, 1926, and it follows that so far as concerns the estates of either husbands or wives dying intestate before the Act the former law as outlined hereunder is still of importance.

SECTION 1.

Rights Arising Before January 1, 1926.
Real Property.

Husband's Interest in his Realty.—Marriage in no way affected the interest of the husband in his own freehold estates of inheritance, and he possessed equal rights of ownership over it after as before marriage, subject, however, to his wife's common law right to dower.

Husband's Interest in Wife's Freehold Estates of Inheritance.—The husband's interest must be viewed in regard to the common law; the common law as modified by the Married Women's Property Act, 1870 (*e*); and the present state of the law as brought about by the Married Women's Property Act, 1882 (*f*), which affects the lands of those married after it came into force, and lands acquired by wives (married before the Act) subsequently to its coming into operation.

At common law the husband took a freehold interest in his wife's estates of inheritance which she possessed at the time of marriage, or of which she became seised during coverture; his largest interest in them did not exceed an estate for life. Before the birth of issue capable of inheriting the wife's lands, the freehold interest of the husband was commensurate with the joint lives of himself and his wife. After the birth of issue the husband's interest was enlarged by the right which accrued of enjoying her lands for his life on surviving his wife; he then became tenant by the curtesy. As long as the coverture lasted,

(*e*) 33 & 34 Vict. c. 93. (*f*) 45 & 46 Vict. c. 75.

his interest was styled tenancy by the curtesy initiate; after the death of his wife, tenancy by the curtesy consummate (*g*).

Power of Husband over Wife's Realty.—Both husband and wife were seised together in her right by entireties: the "effect of which is to put the ownership for the coverture entirely in the husband's power. Hence he can alienate this ownership at pleasure; and his conveyance will pass the freehold without the wife's co-operation" (*h*). He could sue in his own name for injuries to the actual profits of the estate, such as damage to the growing crops, and the like, though for injuries done to the inheritance, whether in the nature of trespass or waste, his wife must have been joined in the suit (*i*). He could charge and aliene her lands for their joint lives; he was entitled to all the rents and profits of her freeholds (*k*); and if he survived her, he was entitled to the arrears of such rents and profits accrued due up to the time of her death, and might have brought an action after the determination of the coverture to recover them (*l*). Without the husband's consent the wife had no power to aliene the lands either by levying a fine, or suffering a recovery, before the Act for the Abolition of Fines and Recoveries (*m*); or after that Act by a deed acknowledged after a separate examination (*n*); nor could she dispose of them by will, unless acting in the exercise of a valid power in that behalf. The husband could mortgage his wife's lands, and the security would last as long as he had any interest in them, but no longer, and his wife or her heirs on taking the property would enjoy it freed from any charges he created. If the joint interest of the husband ceased on the termination of the coverture, and he held over, he was deemed a trespasser; and the full value of the profits received by him during such wrongful possession could be recovered as damages against him or his executors or administrators (*o*).

The trustee of a bankrupt husband whose wife is legal tenant

(*g*) "As soon . . . as any child was born the father began to have a permanent interest in the lands, he became one of the *pares curtis*, did homage to the lord, and was called tenant by the curtesy initiate; and this estate being once vested in him by the birth of the child, was not suffered to determine by the subsequent death or coming of age of the infant." 2 Bl. Com. 126.

(*h*) Macq. H. & W. 28; *Robertson* v. *Norris*, 11 Q. B. 916; 17 L. J. Q. B. 201.

(*i*) 1 Rop. H. & W. 215.

(*k*) Bac. Abr. Bar. and Feme, c. 1; *Kingham* v. *Lee*, 16 L. J. Ch. 491; 11 Jur. 5.

(*l*) 32 Hen. VIII. c. 37, s. 3. His statutory right did not apply to the rents reserved under a lease. *Prescott* v. *Boucher*, 3 B. & Ad. 849.

(*m*) 3 & 4 Wm. IV. c. 74.

(*n*) See *post*, p. 174.

(*o*) 6 Anne, c. 18, s. 5.

for life of land (not settled to her separate use) has no absolute right to the custody of the title-deeds of the land during the coverture; and it is doubtful whether, under ordinary circumstances, an assignee of a husband of his right to receive during the coverture the rents of such land, is entitled as a matter of course to the custody of the deeds (*p*).

As regards leases for years granted by deed by the husband alone, it seems an open question whether they were void, or voidable only so as to be capable of confirmation by the wife after her husband's death (*q*). By 32 Hen. VIII. c. 37, a husband seised of a freehold (not copyhold) estate of inheritance in possession in right of his wife may jointly with his wife make a lease of her lands not exceeding twenty-one years or three lives, with a rent reserved to himself and his wife and her heirs; and though this rent was thus reserved to the wife as well, yet during coverture the husband was entitled to take it; and he or his personal representatives could sue for arrears of it (*r*).

Power of Husband under Settled Estates Act, 1877.—The Settled Estates Act, 1877 (*s*), empowered any person entitled to the possession or to the receipt of the rents and profits of any unsettled estate in right of a wife seised in fee to demise the same (except the principal mansion-house and the demesnes thereof and other lands usually occupied therewith) for twenty-one years in England and thirty-five years in Ireland (*t*), and the demise would be valid against the wife or any person claiming through or under her (*u*). The husband had similar powers with regard to settled estates held by him in right of his wife, unless the settlement excluded them (*x*).

A husband's lease of his wife's lands, whether alone or jointly with her, under 32 Hen. VIII. c. 37, may be good at common law, though not made in compliance with the statute; but on the termination of coverture the wife has an option of affirming or disaffirming the lease (*y*). Her affirmance of such informal lease must be evinced by such acts as the acceptance of rent (*z*), unless the lease was within the provisions of the Statute of Frauds (now

(*p*) *Ex parte Rogers, Re Pyatt*, 26 Ch. D. 31; 53 L. J. Ch. 936.
(*q*) See 1 Br. H. & W. 196, 197.
(*r*) For the law on this subject see 1 Br. H. & W. 193-220.
(*s*) 40 & 41 Vict. c. 18.
(*t*) Sect. 46.
(*u*) Sect. 47.
(*x*) *Ibid.*
(*y*) Bell, H. & W. 175; and see *Toler* v. *Slater*, L. R. 3 Q. B. 42; 37 L. J. Q. B. 33.
(*z*) *Doe* v. *Weller*, 7 T. R. 478.

replaced so far as interests in land are concerned by section 40 of the Law of Property Act, 1925 (*a*)), in which case it will be held altogether void.

Where the wife was entitled to an estate for life, the husband at common law acquired a freehold interest in it during the joint lives of himself and his wife; and he could charge it and deal with it so long as his interest lasted (*b*). If the wife were impeachable for waste, and the husband committed waste during the coverture, he personally, and not the wife or her estate, was liable (*c*).

Powers of Tenant for Life under Settled Land Acts.—The Settled Land Act, 1882 (*d*), provided that where a married woman (who if she had not been a married woman would have been a tenant for life, or would have had the powers of a tenant for life under the Act) is not entitled for her separate use, she and her husband together should have the powers of a tenant for life under the Act (*e*). The Settled Land Act, 1925 (*f*), empowers a married woman to exercise the powers of a tenant for life without her husband, whether or not she is entitled for her separate use or as her separate property, and a restraint on anticipation is not to prevent the exercise of her powers. The Act defines a tenant for life as the person of full age who is for the time being beneficially entitled under a settlement to possession of settled land for his life, and if there are two or more persons of full age so entitled as joint tenants they together constitute the tenant for life (*g*). The powers of sale, exchange and leasing are considerably extended. The tenant for life may lease the settled land, or any easement, right or privilege over it for any purpose whatever, whether involving waste or not, for a term not exceeding in the case of a building lease or a forestry lease 999 years, a mining lease 100 years, and any other lease 50 years (*h*).

Wife's Copyholds.—The husband became seised in right of his wife of her copyhold as well as her freehold land, and one of the homage, and bound to perform the services customary in the manor; his formal admission was, however, not necessary.

(*a*) 15 Geo. V. c. 20.
(*b*) 1 Br. H. & W. 112, 113.
(*c*) *Kingham* v. *Lee*, 16 L. J. Ch. 491; 11 Jur. 5.
(*d*) 45 & 46 Vict. c. 38.
(*e*) Sect. 61.
(*f*) 15 Geo. V. c. 18, s. 25.
(*g*) Sect. 19.
(*h*) Sect. 41. See further as to powers of tenant for life, Part III. Guardian and Ward, chap. vi.

If he did an act entailing the forfeiture of the estate, as by granting a lease not warranted by the custom, the forfeiture did not last beyond his interest; and on his death the wife was entitled to the land (*i*). Many acts or omissions of services on the part of the husband which would legally entail forfeiture were relieved against by the Court of Chancery. The Law of Property Act, 1922 (*k*) (subject to compensation being agreed), at the end of five years abolishes copyholds, but by section 128 provides that all manorial incidents shall remain in force in the meantime, except the right of forfeiture for attempted alienation or for leasing without licence, which right is abolished.

Wife's Separate Real Estate.—A husband had no interest in his wife's lands settled to her separate use during coverture; they were free from his control and liabilities; but if the wife did not dispose of them during coverture, he was entitled as tenant by the curtesy to her equitable estate. He also had no interest in the rents and profits of realty settled to her separate use (*l*). So if he deserted his wife, and she obtained an order protecting her property against him, his rights over her real estates ceased and were discharged so long as the order or protection lasted (*m*); and it was the same where she had obtained a decree of judicial separation (*n*).

Husband's Interest under Married Women's Property Act, 1870.—The interest of a husband (married after the passing of the Married Women's Property Act, 1870 (*o*), and before January 1, 1883), in his wife's real property, was somewhat modified by section 8 of that Act, which provided that "where any freehold, copyhold, or customary-hold property shall descend upon any woman married after the passing of this Act as heiress or co-heiress of an intestate, the rents and profits of such property shall . . . belong to such woman for her separate use, and her receipts alone shall be a good discharge for the same." The wife must take as heiress or co-heiress of her predecessor in title. This section only specifically provides that the rents and profits of the realty shall be to her separate use. If the *corpus* is not to her separate use on the birth of issue capable of inheriting, the husband's curtesy rights cannot be affected by any disposition on her part.

(*i*) *Saverne* v. *Smith*, Cro. Car. 7; 1 Rop. H. & W. 83 *n.*
(*k*) 12 & 13 Geo. V. c. 16. (*l*) See chap. xiii.
(*m*) 20 & 21 Vict. c. 85, s. 25.
(*n*) *Ibid.*, and 21 & 22 Vict. c. 108, ss. 6-10. See chap. xiii.
(*o*) 33 & 34 Vict. c. 93.

Husband's Interest under Married Women's Property Act, 1882.—Husbands married after the Married Women's Property Act, 1882, came into force (*p*) have no longer any interest during coverture in their wives' real estate, except so far as is secured them by settlement, or is validly given them by their wives *inter vivos*; for married women now hold their real property unaffected by any marital rights, as though they were single women (*q*). Husbands also, who were married before the Act came into force, but whose wives have subsequently to its coming into operation acquired in any manner real estate, no longer enjoy their former common law rights over such property; but by force of the statute it is rendered separate estate, free from marital interest and control (*r*).

Husband's Interest in His Chattels Real.—The interest of the husband in his leaseholds belonging to him at the time of his marriage, and subsequently acquired, was and yet remains unaffected by any right of his wife arising out of marriage.

Husband's Interest in His Wife's Chattels Real.—At common law marriage operated as a qualified conveyance of the wife's chattels real, and enabled the husband to alienate and dispose of them at his pleasure, provided that the transaction took effect in his lifetime by some act *inter vivos*. The husband's marital right does not, however, render him a purchaser of his wife's leaseholds by the marriage, and will not prevail against her prior voluntary settlement (*s*); but a valid agreement to assign or dispose of the wife's leaseholds, though not carried out in the husband's lifetime, would be enforced in equity as against the surviving wife (*t*). He may dispose of his wife's leaseholds, whether vested or contingent or reversionary, unless they are of such a nature that they cannot possibly vest in the wife during coverture (*u*). During coverture he may dispose of them altogether as his own—he may assign or sublet them; but he cannot by will dispose of them so as to bar her right by survivorship. If he survive her, he will take them *jure mariti*, and need not take out administration to her estate in order to reduce them into possession (*x*). He may assign both the legal and equitable interest of his wife (*y*),

(*p*) 45 & 46 Vict. c. 6, 75, January 1, 1883.
(*q*) Sect. 1, sub-s. 1, and sect. 2. (*r*) Sect. 5.
(*s*) *Richards* v. *Lewis*, 11 C. B. 1035.
(*t*) *Bates* v. *Dandy*, 2 Atk. 207; and see *Clarke* v. *Burgh*, 2 Coll. 221.
(*u*) *Duberley* v. *Day*, 16 Beav. 33.
(*x*) 1 Roll. Abr. 345; 2 Bl. Com. 435.
(*y*) Macq. H. & W. 24.

and may dispose by way of absolute assignment of the whole of his interest in them (*z*), or by way of sub-lease, in which case the undisposed-of residue of the term would survive to the wife, though the rent reserved on the sub-lease, in the event of the husband dying before the time was at an end would go to his representatives (*a*), or by way of mortgage. Where the assignment is by way of mortgage, the modern tendency of the Courts is to regard (where the contrary does not appear from the deed creating the mortgage) the conveyance by way of mortgage as a mere security in equity and not an absolute assignment at law, operating as a reduction of the chattel into possession by the husband, so that the equity of redemption survives to the wife (*b*). He may also assign it by other means than alienation, as by his taking a second lease of the premises on a different holding, *e.g.*, a lease for their joint lives in the place of a lease for years vested in the wife, because by the acceptance of the second lease the term would be considered as surrendered by operation of law (*c*). Her non-separate leasehold interests were subject to his debts (*d*), and on his bankruptcy vested in his assignee or trustee (*e*).

Husband's Interest in Wife's Leaseholds under Married Women's Property Act, 1870.—A husband married at a date which would bring him within the provisions of the Married Women's Property Act, 1870, would take no interest *jure mariti* in the leaseholds coming to his wife as next-of-kin of an intestate, as they now form part of her separate property (*f*); his interest in them would depend upon her dying without having disposed of them.

Under Married Women's Property Act, 1882.—So, too, if married since the Married Women's Property Act, 1882, came into force, a husband takes no marital interest, at any rate, during the coverture, in his wife's leaseholds, possessed by her at the time of marriage or subsequently acquired; any interest he might take on surviving would depend upon her not having disposed of them during coverture by gift *inter vivos*, or by will (*g*). The like consequences will follow in the case of those who were married before January 1, 1883, but whose wives after that date have become entitled to leasehold property (*h*).

(*z*) *Steed* v. *Cragh*, 9 Mod. 43.
(*a*) Co. Litt. 46 a.
(*b*) *Clark* v. *Burgh*, 2 Coll. 221.
(*c*) 2 Roll. Abr. 495, pl. 50.
(*d*) Co. Litt. 357.
(*e*) *Doe* dem. *Shaw* v. *Stewart*, 1 A. & E. 300.
(*f*) Sect. 8.
(*g*) Sect. 1, sub-s. 1; sect. 2.
(*h*) Sect. 5.

Wife's Interest in Her Husband's Realty.—The wife during coverture has no interest in her husband's realty by virtue of the marriage, unless it has been secured to her by agreement between the parties. Her interest in his freeholds of inheritance does not arise till after the death of her husband without having disposed of them (*i*).

Wife's Interest in Her Own Realty.—The husband, it has been seen, acquired no greater interest in his wife's real estate, freehold or copyhold, than a life interest; but the fee-simple, or fee-tail, remained in her, and if she died during coverture, her undisposed-of realty (subject to a life interest (if any) of her husband) descended to her heirs. This right of the husband to a joint or a life interest in his wife's freeholds was in time affected by the equitable doctrine of the separate use, and she held her realty settled to her separate use discharged and free from her husband's rights over it, and if not restrained from dealing with it could dispose of it as though she were a *feme sole*. The Married Women's Property Act, 1870, gave her rights over real property which was not settled to her separate use by declaring that the rents and profits of freehold, copyhold, or customary freehold property descending upon any woman married after the passing of that Act, as heiress or co-heiress, should belong to her for her separate use (*k*); but the fee-simple in the property is not to her separate use, and she cannot convey it without a deed acknowledged (*l*). By the Married Women's Property Act, 1882, the real estate of married women has been rendered completely free from any marital rights in it, for all those affected by the Act hold their property as if they were single women, and with all the incidents and attributes of complete ownership, unless they are specifically restrained from dealing with it (*m*). A married woman who is lady of a manor is to be deemed a *feme sole* with respect to her copyhold land for the purposes of the Copyhold Act, 1894 (*n*), and is the person who is entitled to receive compensation in respect of the abolition of copyholds by the Law of Property Act, 1922 (*o*).

Gift to Husband and Wife in Joint Tenancy.—The theory of the unity of the persons of the spouses formerly had con-

(*i*) See next chapter.
(*k*) 33 & 34 Vict. c. 93, s. 8. See *King* v. *Voss*, 13 Ch. D. 504.
(*l*) *Johnson* v. *Johnson*, 35 Ch. D. 345; 56 L. J. Ch. 326. Dictum of Jessel, M.R., in *King* v. *Voss* (*ubi sup.*), observed upon.
(*m*) 45 & 46 Vict. c. 75, s. 1, sub-s. 1; ss. 2 and 5.
(*n*) 57 & 58 Vict. c. 46, s. 46.
(*o*) 12 & 13 Geo. V. c. 16.

siderable influence, and husband and wife took by entireties real property or chattels real, or personal property conveyed or devised, or given jointly to them during coverture; each was deemed to be seised of the whole estate, and neither of a part; the husband alone could not convey the property so as to affect the interest of the wife surviving (*p*); but the fund was subject to the husband's debts, and the wife had no equity to a settlement in respect of it (*q*).

Where husband and wife were tenants by entireties, the effect of a decree for dissolution of their marriage was to make them joint tenants, and each party would have the right of account against the other of rents and profits from the date of the decree (*r*). And where property has been so given to husband and wife before the Married Women's Property Act, 1882, came into force, and the husband dies after August 1, 1894, the Finance Act of that year (*s*) will apply, and the duty will be payable on the whole property as passing on his death (*t*).

Effect of Married Women's Property Act, 1882.—The Married Women's Property Act, 1882, operates to prevent a husband having an estate by entireties in any real or personal property which has been conveyed, devised, or bequeathed to him and his wife during the marriage; husband and wife hold either as joint tenants or tenants in common, as the terms of the instrument of donation may provide (*u*), and the wife takes her interest for her separate use (*x*). The general effect of a gift of property, whether by will or *inter vivos*, and whether limited in joint tenancy or tenancy in common (*y*) to a husband and his wife and a stranger, was formerly that the husband and wife took one moiety and the stranger the other moiety of the property. This rule, applicable both to real property (*z*) and to personal property (*a*), was no doubt founded on the doctrine of law that husband and wife were for most purposes one person. But this was a rule of construction only that was

(*p*) 1 Br. H. & W. 25.

(*q*) *Ward* v. *Ward*, 14 Ch. D. 506; 49 L. J. Ch. 409; *Re Bryan, Godfrey* v. *Bryan*, 14 Ch. D. 516; 49 L. J. Ch. 504; these cases can be considered no longer law.

(*r*) *Thornley* v. *Thornley*, [1893] 2 Ch. 229; 62 L. J. Ch. 370.

(*s*) 57 & 58 Vict. c. 30, s. 2 (1 b).

(*t*) Hanson's Death Duties, p. 103.

(*u*) *Re Jupp, Jupp* v. *Buckwell*, 39 Ch. D. 148; 57 L. J. Ch. 774.

(*x*) *Thornley* v. *Thornley* (*ubi sup.*).

(*y*) *Re Wylde*, 2 De G. M. & G. 724; 22 L. J. Ch. 724.

(*z*) Co. Litt. 187 a.

(*a*) *Bricker* v. *Whatley*, 1 Vern. 233; *Re March, Mander* v. *Harris*, 27 Ch. D. 166; 54 L. J. Ch. 143.

applied to the instruments of donation, and any slight indication of intention that each donee mentioned should take an equal part was effectual (*b*). The Married Women's Property Act, 1882, which was not intended to alter any rights except those of husband and wife *inter se*, has not effected any change in this branch of the law (*c*); accordingly, where it is intended that a stranger shall take one moiety and the husband and wife the other moiety, the property will be so apportioned; but the wife will take her share of the joint moiety as her separate property (*d*). But it is not unlikely that the future tendency will be to hold that the husband and wife will take separate and not joint interests, the effect of which will be distinctly in favour of husband and wife, who will each take a full share (*e*). An illustration of this tendency is given by the Administration of Estates Act, 1925 (*f*), which provides that on the distribution or division of the residuary estate of a person dying intestate after January 1, 1926, husband and wife shall be treated as two persons; and by the Law of Property Act, 1925 (*g*), a husband and wife shall for all purposes of acquisition of any interest in property, under a disposition made or coming into operation after the commencement of this Act, be treated as two persons.

Effect of Marriage as Severance of Joint Tenancy.—Marriage alone does not operate as a severance of a joint tenancy where a woman marries who is joint tenant of real estate, whether of freehold or chattel interest (*h*); or of choses in action not reduced into possession by the husband (*i*); but does so operate in respect of personal chattels in possession (*k*).

(*b*) *Warrington* v. *Warrington*, 2 Ha. 54; and see *Dias* v. *De Livera*, 5 App. Cas. 123; 49 L. J. P. C. 26. See *Jeffery*, *Nussey* v. *Jeffery*, [1914] 1 Ch. 375; 83 L. J. Ch. 251 (gift to husband, his wife and their daughter; held that they took in equal third shares).

(*c*) See *Re March*, *Mander* v. *Harris* (*ubi sup.*). In this case the Court of Appeal reversed Chitty, J. (26 Ch. D. 222), who held that the property was divisible into thirds and not into moieties, when it accrued after the Act to a stranger and a husband and wife married before the Act.

(*d*) *Re March*, *Mander* v. *Harris* (*ubi sup.*).

(*e*) *Re Dixon*, *Byram* v. *Tull*, 42 Ch. D. 306; 38 W. R. 91. In this case a testator gave his residue to "W. B.," "E. B., his wife," "S. R.," "J. D.," "G. D. B.," "C. C.," and "C. C., his wife," to be equally divided between them, share and share alike. It was held that the residue was divisible into sevenths, "W. B." and "E. B., his wife," and "C. C." and "C. C., his wife," taking separately.

(*f*) 15 Geo. V. c. 23, s. 46 (2). (*g*) 15 Geo. V. c. 20, s. 37.

(*h*) Co. Litt. 185 b. *Palmer* v. *Rich*, [1897] 1 Ch. 134; 66 L. J. Ch. 69.

(*i*) Co. Litt. 351 b; *Armstrong* v. *Armstrong*, L. R. 7 Eq. 518; 38 L. J. Ch. 463; *Re Butler's Trusts*, *Hughes* v. *Anderson*, 38 Ch. D. 286; 57 L. J. Ch. 643, disapproving of *Baillie* v. *Treharne*, 17 Ch. D. 388.

(*k*) *Re Butler's Trusts*, *Hughes* v. *Anderson* (*ubi sup.*).

The principle underlying this distinction is that the effect of marriage on particular property in which a woman has an interest as joint tenant depends on whether the marriage divests the property from the wife and vests it in the husband. If it does, then the joint tenancy is severed; if it does not, there is no severance. Where some *novus actus interveniens* on the part of the husband is required—*e.g.*, an assignment of the wife's chattels real, or reduction into possession of her choses in action, in neither of these cases does marriage operate as a severance (*l*). A settlement or a covenant to settle by a joint tenant on her marriage is effectual to sever the joint tenancy (*m*); and this is so even where the settlor is an infant, and the property settled is reversionary (*n*). But where a man has married a woman who is joint tenant with another, a mere lease by her husband and her joint tenant did not in former days operate to sever the joint tenancy (*o*), and it is difficult to see how any act of the husband since the Married Women's Property Act, 1882, after marriage can have any operative effect to sever the joint tenancy of his wife and the joint tenant. Where husband and wife are tenants by entireties, a decree absolute for dissolution of marriage makes them joint tenants, and the wife is entitled to an account of rents and profits as from the date of the decree (*p*). As another consequence of this complete power which a married woman possesses over her property, it will follow that if she enter into a contract for the conveyance of her property as a single woman, and afterwards marry, specific performance will be decreed against her, and she will be compelled to convey (*q*).

Wife's Power of Disposition.—At common law and under the Married Women's Property Act, 1870 (*r*), the wife was unable, except by deed or will under a power, or by virtue of an agreement with her husband before marriage, to dispose of her interest in the legal estate of her realty without his concurrence, unless dispensed with, and going through the proper forms prescribed from time to time (*s*); but now she will

(*l*) Per Bowen, L.J., in *Re Butler's Trusts*, *Hughes* v. *Anderson* (*ubi sup.*).
(*m*) *Caldwell* v. *Fellowes*, L. R. 9 Eq. 410.
(*n*) *Burnaby* v. *Equitable Reversionary Interest Society*, 28 Ch. D. 416; 54 L. J. Ch. 466.
(*o*) See *Palmer* v. *Rich* (*ubi sup.*).
(*p*) *Thornley* v. *Thornley*, [1893] 2 Ch. 229; 62 L. J. Ch. 370.
(*q*) The decision of Lord Cottenham in *Jordan* v. *Jones*, 2 Ph. 170, reversing that of Wigram, V.-C., is no longer law.
(*r*) *Johnson* v. *Johnson*, 35 Ch. D. 345; 56 L. J. Ch. 326.
(*s*) This was otherwise in equity; and if the married woman had trustees who

be able to sell it, charge it, mortgage it, and make leases of it free from any control on the part of her husband. Though all the formalities are no longer required in the case of married women desirous of disposing of their property who come under the provisions of 45 & 46 Vict. c. 75 (*t*), yet, as the old law still holds good in many cases, it has been thought fit to set out shortly its requirements.

Fines and Recoveries Act, 1834.—Before the Act for the Abolition of Fines and Recoveries (*u*), a wife could only dispose of her legal estate by going through the fictitious and expensive process of levying a fine or suffering a recovery. By section 77 of the last-mentioned Act, it was enacted that—

"It shall be lawful for every married woman in every case, except that of being tenant in tail, for which provision is already made by this Act (*x*), by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate (*y*) which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure, &c., as fully and effectually as she could do if she were a *feme sole*—save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed."

These provisions did not apply to copyhold lands, which by custom might have been conveyed by the married woman surrendering them, with her husband's concurrence, into the hands of the lord of the manor (*z*); nor, among other things, where she executed a deed only as protector of a settlement, giving her consent to the disposition of the tenant in tail (*a*); but a declaration of trust of copyholds by an acknowledged deed was an effectual disposition by her within section 77 of the Act (*b*). Though there were irregularities in the deeds

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were seised of the legal estate, on her assignment, they became trustees of her assignee, and she could compel them to execute a conveyance of the legal estate to him. *Taylor* v. *Meads*, 34 L. J. Ch. 203; 13 W. R. 394.

(*t*) See *Riddell* v. *Errington*, 26 Ch. D. 220; 54 L. J. Ch. 293.

(*u*) 3 & 4 Wm. IV. c. 74.

(*x*) See sect. 40.

(*y*) The equitable reversionary interest of a married woman in a sum of money secured by mortgage is an "estate" within the meaning of section 1 of the Act, so as to entitle her to dispose of it. *Miller* v. *Collins*, [1896] 1 Ch. 573; 65 L. J. Ch. 353. In this case, *Re Newton's Trusts* (23 Ch. D. 181) was overruled. A mere expectancy that a parent will die intestate and leave real property is not an "estate" within this section. *Allcard* v. *Walker*, [1896] 2 Ch. 369; 65 L. J. Ch. 660.

(*z*) Proviso of section 77.

(*a*) Sect. 79.

(*b*) *Carter* v. *Carter*, [1896] 1 Ch. 62; 65 L. J. Ch. 86.

executed by the wife, yet if it could be satisfactorily proved that the deeds (*c*) were duly taken such irregularities would not be fatal (*d*).

The Law of Property Act, 1925 (*e*), provides that every disposition (including a disclaimer) of real or personal property, or any interest therein, which a married woman is authorized to make by any enactment by deed acknowledged, shall be effectual from the date of its execution if made by her with the concurrence of her husband, but without acknowledgment. The separate examination of a married woman is not a necessary preliminary to any order of the Court directing payment of money or transfer of property to her, or in accordance with her directions. Where the Court has power to dispense with the concurrence of the husband, and the wife is entitled for her separate use, the Court may declare that the disposition shall have the same effect as if her husband had concurred, and the disposition takes effect without acknowledgment. The enactment refers to deeds executed and orders made on and after January 1, 1926, and is not to render concurrence necessary where it would not have been requisite.

A married woman is also given power (*f*) by deed to disclaim any estate or interest in land with or without the concurrence of her husband, as the case may require. A husband is not a necessary party where the wife would have been entitled, apart from the disclaimer for her separate use or as her separate property, nor where the property consists of a trust estate.

Dispensing with Concurrence.—The husband's concurrence, though usually necessary, might under certain circumstances be dispensed with; thus it was provided that, if a husband, in consequence of being a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, or from any cause, is incapable (*g*) of executing a deed, or of making a surrender of copyhold lands, or if his residence is unknown, or he is in prison, or is living apart from his wife, either by mutual consent or by sentence of divorce, or from any other cause, the Court (*h*) might make an order in a

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(*c*) *Re Mayer*, 40 L. J. C. P. 201; 19 W. R. 641; S. C. *Re Sandilands*, L. R. 6 C. P. 411.

(*d*) *Re Packer*, L. R. 5 C. P. 424; 43 L. J. C. P. 245.

(*e*) 15 Geo. V. c. 20, s. 167.

(*f*) Sect. 168.

(*g*) As from infancy, *Re Haigh*, 26 L. J. C. P. 209; 2 C. B. N. S. 198; or lunacy, see *Re Reeves*, 24 W. R. 848.

(*h*) *Re Giles*, 70 L. T. 757.

summary way upon the application of the wife, and upon such evidence as the Court may deem sufficient, dispensing with the concurrence of the husband (*i*). Where application has been made to the husband, the Court must be satisfied that a proper application has been made to him, and he has refused his concurrence (*k*). The dispensing by order with the husband's concurrence rendered the separate examination of, and acknowledgment by, the wife unnecessary (*l*). But the interests of the husband existing independently of the Act were not affected by the dispensing with his concurrence and the alienation on the part of his wife, and his common law rights in his wife's property acquired through coverture were not taken away from him (*ll*). Only married women affected by the old law had to comply with these formalities.

Married Women's Property Act, 1882.—Where women have been married, and their title to the property has accrued, after January 1, 1883, they do not require separate examination or the concurrence of their husbands (*m*). Under the Settled Estates Act, 1877 (*n*), a married woman applying to the Court, or consenting to an application, was required to be examined apart from her husband; and if she was married, and her interest in the property was acquired, before the Married Women's Property Act, 1882, came into force, she still required to be separately examined (*o*); and this was so where the money resulting from the sale of settled estates was in Court, notwithstanding the effect of the provisions of section 32 of the Settled Land Act, 1882 (*p*). But if she was married since the Married Women's Property Act, she was not required to be separately examined (*q*); nor did she need to be separately examined where she submitted her interests to the Court in an application under the Settled Estates Act, 1877 (*r*); nor where her interest in her property was acquired subsequently to the commence-

(*i*) Sect. 91.
(*k*) *Re Mirfin*, 4 Man. & Gr. 635.
(*l*) *Goodchild* v. *Dougal*, 3 Ch. D. 650; and see Law of Property Act, 1925, s. 167, abolishing acknowledgments.
(*ll*) *Fowke* v. *Draycott*, 29 Ch. D. 996; 54 L. J. Ch. 977.
(*m*) *Re Drummond and Davie's Contract*, [1891] 1 Ch. 524; 60 L. J. Ch. 258. There would seem to be yet a case in which the concurrence of the husband would be necessary, viz., where they were jointly seised of the property which they desired to convey. The wife's interest would have to be protected, and certainly the husband's concurrence would be requisite.
(*n*) 40 & 41 Vict. c. 18. s. 50.
(*o*) *Re Harris' Settled Estates*, 28 Ch. D. 171; 54 L. J. Ch. 208.
(*p*) *Re Arabin's Trusts*, 52 L. T. 728.
(*q*) *Re Shirley's Settled Estates*, 59 L. J. Ch. 82; 38 W. R. 32.
(*r*) *Riddell* v. *Errington*, 26 Ch. D. 220; 54 L. J. Ch. 293.

ment of the Act (*s*). If she were an infant, the concurrence of her guardian was not enough, but she had to be separately examined (*t*); though the Court under certain circumstances would dispense with her separate examination (*u*). A married woman was able to aliene her copyhold lands, according to the usual custom of the manor, by surrendering them into the hands of the lord of the manor, with her husband's concurrence, or by acknowledged deed declaring a trust (*x*). Under the effect of the Married Women's Property Act, 1882, such surrender might be effected by her without the concurrence of her husband.

Nothwithstanding the abolition of acknowledgments by married women under section 167, sub-section 1 of the Law of Property Act, 1925 (*y*), it may still be deemed advisable to have a separate examination where the married woman is not of age; but by section 167, sub-section 2 (*y*) of the Law of Property Act, 1925, the separate examination of a married woman is no longer to be necessary as a preliminary to any order of the Court directing payment or transfer of any money or property to her, or in accordance with her directions.

Mortgages by Married Women.—As incidental to her interest in her real estate, a married woman could mortgage it, but, as in the case of a sale, her husband had to concur; she was required to be separately examined, and her deed acknowledged before she could make a valid conveyance by way of mortgage (*z*). Compliance with the forms of the Fines and Recoveries Act, 1834, was needed in the case of those mortgaging their real property who were married before January 1, 1883, and whose title to their property vested in them before that date, but not in the case of those who were married on or after that date, or whose title to their property accrued after that date, though their marriage was anterior to it (*a*).

When mortgages of the wife's property were executed by husband and wife, questions often arose as to whether the equity of redemption was in the wife and her heirs, or in the husband and his heirs. As a general rule, it was held that the equity of redemption remained in the wife and her heirs (*b*). To defeat

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(*s*) See *Re Batt's Settled Estates*, [1897] 2 Ch. 65; 66 L. J. Ch. 635.
(*t*) See *Re Broadwood's Settled Estates*, L. R. 7 Ch. App. 323; 41 L. J. Ch. 349.
(*u*) See *Re Halliday's Settled Estates*, L. R. 12 Eq. 199; 40 L. J. Ch. 687.
(*x*) *Carter* v. *Carter*, [1896] 1 Ch. 62; 65 L. J. Ch. 86.
(*y*) 15 Geo. V. c. 20.
(*z*) 3 & 4 Wm. IV. c. 74, s. 77; *Price* v. *Copner*, 1 Sim. & St. 347.
(*a*) 45 & 46 Vict. c. 75, s. 5. (*b*) Macq. H. & W. 183.

this title of the wife, a change of property in the realty must have been intended, and she must have clearly and expressly contracted that such change should be effected (*c*); and only if the intention was that the husband should have the equity of redemption was he entitled to it (*d*); thus, where an estate belonging to the wife was mortgaged, and the equity of redemption was in words reserved to the husband and his heirs, the Court held that there was a resulting trust for the wife and her heirs (*e*). Her contract, or desire that the property should change, and the equity be in her husband, may be proved by her assenting to limitations in the mortgage deed inconsistent with her right to the equity of redemption (*f*); in other words, the mortgage deed operates as a new settlement, diverting the property of the estate from one party to another (*g*). Where a married woman's property affected by the new law is conveyed by way of mortgage, there can be no doubt of the equity being in herself and her heirs, for she alone will convey the property.

Where a wife mortgaged her lands for the purpose of paying off her husband's debts, she was entitled in equity to have her estate exonerated out of his assets. This equity was put on the principle that she was merely a surety for his debts, and she had all the remedies of a surety (*h*). "It is a common case for a wife to join in a mortgage of her inheritance for a debt of her husband. After his death she is entitled to have her real estate exonerated out of his personal and real assets; the Court considering her estate only as a surety for his debt" (*i*). The principle is the same where the wife mortgages her property in the exercise of a power, if she has a beneficial interest in such property (*k*). This equity still exists, even if part of the mortgaged property belongs to the husband (*l*). So, where a wife pays off her husband's mortgage by a loan of money out of her separate estate, she is entitled to stand in the place of the mortgagee; and even where she joins with him in charging her estate she is entitled to be exonerated out of his estate (*m*). The consequence of this doctrine was that

(*c*) *Re Belton's Trust Estates*, L. R. 12 Eq. 553.
(*d*) *Jackson* v. *Innes*, 1 Bli. 104.
(*e*) *Ibid.* (*f*) *Ibid.*
(*g*) See *Reeves* v. *Hicks*, 2 Sim. & St. 403.
(*h*) *Earl of Huntingdon* v. *Countess of Huntingdon*, 2 Bro. P. C. 1.
(*i*) Per Lord Hardwicke in *Robinson* v. *Gee*, 1 Ves. Sen. 252; see *Hudson* v. *Carmichael*, Kav. 613.
(*k*) *Ferguson* v. *Gibson*, L. R. 14 Eq. 379; 41 L. J. Ch. 640.
(*l*) *Aguilar* v. *Aguilar*, 5 Madd. 414.
(*m*) *Parteriche* v. *Powlett*, 2 Atk. 384.

the other creditors of her husband had no preference over her in the administration of his assets. Under certain circumstances a wife is postponed to her husband's creditors in his bankruptcy in respect of loans made by her to him for the purpose of any trade or business carried on by him (*n*); yet this provision does not apply where she merely secures by her own separate property advances made to him in his business, which she afterwards herself pays off (*o*). The presumption that the married woman's property was a surety only for her husband's debts may be rebutted, and if the money raised was really advanced to her, or expended in paying her debts, or she obtained the benefit of it, her equity of exoneration does not arise (*p*). Parol evidence may be admitted to show for whose benefit the money was really advanced (*q*).

Where a wife applied to the Court to remove the restraint against anticipation of her settled property for the purpose of raising money to pay her husband's debts for a reason in which she was equally interested with him, and money was raised and paid over to the husband, she was afterwards held not entitled to any equity of exoneration (*r*). Though the wife may waive this equity of exoneration, such waiver will not affect the rights of her representatives or creditors to stand in her place and enforce the rights to which she was entitled (*s*).

Leases by Married Women.—At common law a married woman was incapacitated from making leases of lands belonging to her; and her husband alone could not make leases of them to last beyond the coverture. Under 32 Hen. VIII. c. 28, husband and wife together were empowered to make leases of lands to which the wife was entitled in fee or in tail for a period not exceeding twenty-one years, in accordance with the conditions prescribed by that Act. In equity she was entitled to execute leases of the property settled to her separate use, and the extent of the term created depended upon the amount of her interest in the property demised. Under the Settled Estates Act, 1877 (*t*), a married woman, whether adult or an infant,

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(*n*) 45 & 46 Vict. c. 75, s. 3.

(*o*) *Re Cronmire, Ex parte Cronmire*, [1901] 1 K. B. 480; 70 L. J. K. B. 310. See *post*, chap. xii.

(*p*) *Hudson* v. *Carmichael* (*ubi sup.*); *Gee* v. *Smart*, 26 L. J. Q. B. 305; 3 Jur. (N.S.) 1056.

(*q*) *Gray* v. *Downman*, 27 L. J. Ch. 702; 6 W. R. 571.

(*r*) *Clinton* v. *Hooper*, 1 Ves. 173; 3 Bro. C. C. 201; *Paget* v. *Paget*, [1898] 1 Ch. 470; 69 L. J. Ch. 266.

(*s*) *Lancaster* v. *Evors*, 10 Beav. 154, 266.

(*t*) 40 & 41 Vict. c. 18, s. 52.

might consent to a lease by her husband of her settled or unsettled property in pursuance of the prescribed conditions (*u*); her consent had to be ascertained by separate examination (*x*). But examination is not requisite in the case of those married after January 1, 1883 (*y*), and of those married before that date whose interest in their property has been acquired since that date (*z*).

Settled Land Act, 1882.—Under the Settled Land Act, 1882 (*a*), a married woman who, if she had not been a married woman, would have been a tenant for life, or would have had the powers of a tenant for life (*b*), under the provisions of that Act, was entitled for her separate use, or was entitled under any statute for her separate property, or as a *feme sole*, then she, without her husband, had the powers of a tenant for life. Where she was constituted a *feme sole* by a decree of judicial separation, the property over which she obtained the sole power must have been acquired, whether in possession or reversion, after the date of the decree (*c*). Where she was entitled otherwise than as aforesaid, then she and her husband together had the powers of a tenant for life. The provisions of this Act referring to a tenant for life, and a settlement and settled land, extended to the married woman without her husband, or to her and her husband together, as the case might require, and to the instrument under which her estate or interest arose, and to the land therein comprised. The married woman might execute, make, and do all deeds, instruments, and things necessary or proper for giving effect to these provisions. A restraint on anticipation in the settlement did not prevent the exercise by her of any power, but it did not constitute her a tenant for life (*d*). An infant married woman was not enabled to exercise the powers of the Act (unless they were conferred upon her expressly), for the disability of infancy remained notwithstanding coverture, and her trustees would have to exercise the powers (*e*). Since the passing of the Married

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(*u*) For what leases can be made under this Act, see Part III., Guardian and Ward, chap. vi.

(*x*) Sect. 50.

(*y*) *Riddell* v. *Errington*, 26 Ch. D. 220; 54 L. J. Ch. 293.

(*z*) *Re Batt's Settled Estates*, [1897] 2 Ch. 65; 66 L. J. Ch. 635.

(*a*) 45 & 46 Vict. c. 38, s. 61.

(*b*) For what are the powers of a tenant for life, see *post*, Part III., Guardian and Ward, chap vi.

(*c*) *Waite* v. *Morland*, 38 Ch. D. 135; 57 L. J. Ch. 655.

(*d*) *Bates* v. *Kesterton*, [1896] 1 Ch. 159; 65 L. J. Ch. 108.

(*e*) See Wolst. (9th edit.), 425.

Women's Property Act, 1882, the provisions of the Settled Estates Act, 1877, as to her leasing powers would only apply to lands vested in a married woman before January 1, 1883; so, too, the powers to be exercised by her under the Settled Land Act, 1882, required to be exercised by her jointly with her husband as to lands vesting in her before that date, though she could exercise them solely with regard to lands vesting in her after that date, or if she married subsequently to it.

Under the Agricultural Holdings Act, 1883 (*f*), a woman married before January 1, 1883, who possessed separate property without restraint upon anticipation, may exercise the powers under that Act without the concurrence of her husband.

Settled Land Act, 1925.—The Settled Land Act, 1925 (*g*), repeals the various earlier Settled Land Acts as a preliminary to codifying the law. By section 19 it defines a tenant for life as the person of full age who is for the time being beneficially entitled under a settlement to possession of settled land for life. If there are two or more persons in any case, they together constitute the tenant for life; if where there are two or more they are not all of full age, those who are of full age together constitute the tenant for life, and, notwithstanding that the land is charged or incumbered, the tenant for life is still to be deemed to be such. Other limited owners who have the powers of a tenant for life (*gg*) include a tenant in tail, a person entitled subject to a gift over, as, for instance, on failure of issue; the holder of a base fee; a tenant for years determinable on life not being a leaseholder at a rent; a tenant by the curtesy; a person entitled to the income of land until sale or forfeiture, unless the land is subject to an immediate binding trust for sale; a person beneficially entitled subject to any charge or power of charging; and a married woman entitled to land in fee-simple or for a term of years absolute, subject to a restraint on anticipation.

Interest of Wife in Her Chattels Real.—The interest of the wife in her chattels real at law was altogether at the disposal of her husband, and if he chose by act during his lifetime to dispose of them he barred her right to them; but his testamentary disposition unaccompanied by any act *inter vivos* charging the property in them did not exclude her claim by survivorship (*h*).

(*f*) 46 & 47 Vict. c. 61, s. 26. (*g*) 15 Geo. V. c. 18.
(*gg*) Sect. 20. For powers of a tenant for life, see Part III., chap. vi.
(*h*) Macq. H. & W. 23.

In equity she had full right and control over her leaseholds settled to her separate use, and her interest in them under the law introduced by the Married Women's Property Acts will be quite unaffected by any marital rights.

Section 2.

Personal Property.

Interest of Husband in His Own Personalty.—The fact of marriage in no way altered the relations of a man to his personal property. All his personal goods and chattels, whether existing at the time of marriage or subsequently brought into existence, remain his absolutely, without any right to or claim over them on the part of his wife. "Those chattels, personal in possession, and specific chattels in the hands of third parties, which before the marriage belonged to the husband, continue to belong to him exclusively after the marriage, the *communio bonorum* being unknown to the marriage law of England" (*i*).

Interest of Husband in Wife's Personalty.—Marriage, as has been stated already, operated at common law as a conveyance of all the wife's specific personal chattels to her husband, *i.e.*, he took *jure mariti* an absolute interest in all such property which she possessed at the time of marriage or subsequently became possessed of. This operated at times very harshly against the wife, and prevented her from holding any personal property except on the sufferance of her husband. This doctrine was tempered and modified by the equity invention of the separate estate, by which an interest in her own property was secured to a married woman unaffected by any rights of her husband (*k*). Her husband's power over her equitable estate in pure personal chattels (except chattels real) was regulated by his power over the legal estate; and his right over a specific chattel held in trust for his wife was absolute, but it was not complete in her choses in action until he had taken steps to reduce them into possession (*l*).

Now by the Married Women's Property Act, 1882, the common law rights of a husband married after that Act came into force as to his wife's personal property are completely taken away. His rights to her property on intestacy will be considered in a following chapter (*m*).

(*i*) Macq. H. & W. 18, 19.
(*l*) Lewin, 929.
(*k*) See chap. xiii., Separate Estate
(*m*) See next chapter.

Husband's Interest in Wife's Choses in Reversion.—A husband under the former state of the law was entitled to the choses in reversion of his wife, whether vested or contingent, which fell into possession during coverture, but not otherwise. If they did not fall into possession during coverture he could not validly assign them, so as to defeat his wife's title by survivorship (*n*). If the reversionary property did not vest in possession during the coverture, but the husband survived the wife, by taking out letters of administration to her estate, he became entitled to it on its vesting in possession. If he died before it vested in possession, his personal representatives, on taking out letters of administration to his wife's estate, became entitled to it (*o*).

Under the Married Women's Property Act, 1870, the husband is deprived of his interest in his wife's reversionary property not exceeding £200 coming to her during coverture under any deed or will (*p*). Under the Married Women's Property Act, 1882, the interest of a husband married after the Act came into force in his wife's reversionary property of every description, and to any amount, is expressly taken away (*q*); so is the interest of husbands who were married before that date, but the reversionary property of whose wives vests in possession after that date (*r*). But the principle of the case of *Re The Goods of Harding* (*o*) will apply if the wife die intestate as to her property, and the husband will be entitled to her reversionary choses on administration.

Interest of Husband in Wife's Choses in Action.—The right of the husband to the wife's specific chattels and to her choses in action was not identical at law. To the former, whether belonging to his wife at the time of marriage or devolving upon her during marriage, he was absolutely entitled, and might have brought an action for them in his own name, and if he survived her was entitled to them without administering to her estate; and if he died in her lifetime, they did not survive to the wife, but to his executors or administrators (*s*). But this was not

(*n*) *Ashby* v. *Ashby*, 1 Coll. 553.

(*o*) L. R. 2 P. & D. 394; 41 L. J. P. M. & A. 65.

(*p*) 33 & 34 Vict. c. 93, s. 7. If under the same instrument but by different titles she derives several sums of money, each of them less than £200, though in the aggregate exceeding that amount, as between herself and her husband, she will be deemed to have acquired the separate use in each of such sums. *Re Davies, Harrison* v. *Davies*, [1897] 2 Ch. 204; 66 L. J. Ch. 512.

(*q*) 45 & 46 Vict. c. 75, s. 2. (*r*) Sect. 5.

(*s*) Bac. Abr. Bar. and Feme (C.); 1 Rop. H. & W. 169; and see *Bird* v. *Peagrum*, 22 L. J. C. P. 166; 13 C. B. 639.

so in the case of her choses in action; and marriage was only a qualified gift to the husband of his wife's choses in action, viz., upon condition that he reduced them into possession during its continuance; for if he happened to die before his wife without having reduced them into possession, she and not his personal representatives was entitled to them, for a wife was capable of having a chose in action conferred upon her, which survived to her on her husband's death, unless he had interfered by doing some act to reduce it into possession (*t*); or if they were reduced into possession after the marriage had been dissolved (*u*), unless he had become a purchaser of them, as by ante-nuptial settlement (*x*).

The Married Women's Property Act, 1882, affects the husband's interests in his wife's choses in action as in other classes of property, for the term "property" in the Act includes "a thing in action" (*y*). Thus his interest in them depends upon whether he was married before or after the Act came into force. If he has married since the Act came into force, unless he has by agreement acquired a right to them, he has no interest in them (*z*). Neither has he any interest where he was married before the Act came into force, but his wife's title to them has accrued since that date (*a*).

Choses in Action.—A chose in action is a right to be asserted, or property to be reduced into possession by action at law or in equity. A wife's choses in action would be such things as debts owing to her on bond or otherwise (*b*), bills of exchange and promissory notes payable to her (*c*), arrears of rent (*d*), legacies (*e*), trust funds (*f*), residuary personal estate (*g*), money, wages, earnings, and other property, the recovery of which necessitates a recourse to legal process. Debentures are also

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(*t*) *Dalton* v. *Midland Counties Railway Company*, 22 L. J. C. P. 177; 13 C. B. 474; 1 Wms. Exors. (10th edit.) 641; *Osborn* v. *Morgan*, 21 L. J. Ch. 318; 16 Jur. 52; *Re Biaggi*, W. N. (1882) 65; *Re Barrow's Policy Trusts*, [1918] 1 Ch. 452.

(*u*) *Gaters* v. *Madeley*, 6 M. & W. 423; *Sherrington* v. *Yates*, 13 L. J. Ex. 249.

(*x*) *Norbone's Case*, Freem. Ch. 282.

(*y*) 45 & 46 Vict. c. 75, s. 24.

(*z*) Sect. 1 (sub-sect. 2), sect. 24.

(*a*) Sect. 5.

(*b*) *Coppin* v. ——, 2 P. Wms. 496.

(*c*) *Gaters* v. *Madeley* (*ubi sup.*). A married woman will now be the proper person to endorse negotiable instruments given to her either before or during marriage; and her husband will no longer be entitled to do so, and act upon them. See *Barlow* v. *Bishop*, 1 East, 432.

(*d*) *Salwey* v. *Salwey*, Amb. 693.

(*e*) *Blount* v. *Bestland*, 5 Ves. 515.

(*f*) *Fleet* v. *Perrins*, L. R. 3 Q. B. 500; 38 L. J. Q. B. 233.

(*g*) *Baker* v. *Hall*, 12 Ves. 497.

choses in action (*h*), and so are shares in a partnership (*i*); but shares in companies governed by modern statutes are not, for the legal as well as the equitable title to them can be transferred by delivery (*k*).

Husband's Right to Sue for and Recover Wife's Choses in Action.—The property in the wife's choses in action were not changed by the marriage alone, but by the marriage the husband acquired a power of suing for and recovering them, and so making them his own, by converting them in fact into chattels personal in possession; and payment ought, during the marriage, to be made to the husband, not to the wife, except as his agent (*l*). The husband's interests were put an end to by death; also by divorce (*m*), judicial separation (*n*), or the obtaining of a protection order. In the case of judicial separation the chose in action must have vested after the date of the decree (*o*); and in case of a protection order after the desertion and during the continuance of the order (*p*).

Reduction into Possession.—The following acts have been held a sufficient reduction into possession by the husband: Receipt by the husband of the fund owing to his wife, or a joint authorization by husband and wife of a person to receive it who actually does receive it (*q*); also a receipt by an agent appointed by the husband of money forming part of the estate of an intestate of which the wife is administratrix (*r*); transferring stock of wife by husband into his own name, or into the names of trustees appointed by him (*s*); a loan of his wife's money by her trustee on mortgage of husband's own property (*t*); so, too, a payment into court to the credit of the lunacy account, the husband being a lunatic (*u*). Where the husband assigns his wife's choses in action before reducing them into possession his assignee must reduce them before the husband dies.

The following have been held insufficient reduction: Mere

(*h*) *Ex parte Rensburg*, 4 Ch. D. 685.
(*i*) *Re Bainbridge*, 8 Ch. D. 218.
(*k*) Lind. Comp. 454.
(*l*) Macq. H. & W. 48.
(*m*) *Prole* v. *Soady*, L. R. 3 Ch. App. 220.
(*n*) *Re Insole*, L. R. 1 Eq. 470; 35 L. J. Ch. 177.
(*o*) See *Waite* v. *Morland*, 38 Ch. D. 155; 57 L. J. Ch. 655.
(*p*) *Re Coward and Adam's Purchase*, L. R. 20 Eq. 179; 44 L. J. Ch. 384. See *Cooke* v. *Fuller*, 26 Beav. 99.
(*q*) Roll. Abr. 342, 350.
(*r*) *Re Barber*, 11 Ch. D. 442.
(*s*) *Burnham* v. *Bennett*, 2 Coll. 254.
(*t*) *Rawlins* v. *Birkett*, 4 W. R. 795; *Widgery* v. *Tepper*, 7 Ch. D. 423; 47 L. J. Ch. 578; affirming 5 Ch. D. 516.
(*u*) *Re Jenkins*, 5 Russ. 183.

appropriation of a fund by a third party to satisfy a legacy to the wife on which the husband receives interest (*x*), or the mere receipt of interest on a debt due to the wife (*y*), or a set-off of the wife's fund against a debt owed by the husband (*z*), or proof on his part of his wife's debt in bankruptcy (*a*); neither does the mere receipt of part of the wife's chose in action constitute a reduction into possession (*b*). Thus, where a wife was entitled to a sum of money in the hands of a third person, and on her marriage the holder transferred the sum into the joint names of the husband and wife, the husband directing him to keep it separate from his (the husband's) other moneys, this was held no reduction (*c*); an investment not inconsistent with the wife's equities is not a reduction (*d*). It is the same where the husband is not at any time during the coverture capable of asserting his rights (*e*), or where he obtains possession of the chose in action in a non-marital but representative capacity as executor (*f*) or trustee (*g*), or where the chose cannot be reduced to a certainty in his lifetime (*h*), or he agree that stock belonging to the wife shall be settled on himself and wife, and he die before the settlement is completed (*i*), or where by agreement he has precluded the reduction into possession (*k*). Where there is a decree in a joint suit by husband and wife in respect of money claimed in her right, and the husband die before any further proceedings are taken, the benefit of the decree will survive to the wife (*l*); so, where judgment is recovered in an action, but the husband dies before execution, there is no reduction into possession (*m*).

If the husband does not reduce his wife's choses in action into possession during coverture, and he survive her, he must take out letters of administration before he can become possessed of them (*n*); but if he dies before he administers, his repre-

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(*x*) *Blount* v. *Bestland*, 5 Ves. 515.
(*y*) *Hart* v. *Stephens*, 6 Q. B. 957; 14 L. J. Q. B. 148.
(*z*) *Harrison* v. *Andrews*, 13 L. J. Ch. 243.
(*a*) *Hall* v. *Hill*, 1 Con. & Law, 135; *Anon.*, 2 Vern. 706.
(*b*) *Nash* v. *Nash*, 2 Madd. 133.
(*c*) *Scrutton* v. *Patillo*, L. R. 19 Eq. 369; 44 L. J. Ch. 249.
(*d*) *Ryland* v. *Smith*, 1 Myl. & Cr. 53.
(*e*) *Aitchison* v. *Dixon*, L. R. 10 Eq. 589; 39 L. J. Ch. 705.
(*f*) *Baker* v. *Hall*, 12 Ves. 497.
(*g*) *Wall* v. *Tomlinson*, 16 Ves. 413.
(*h*) *Amhurst* v. *Selby*, 11 Vin. Abr. 377, pl. 8.
(*i*) *Fort* v. *Fort*, Forr. 171.
(*k*) *Nicholson* v. *Drury Buildings Estate Company*, 7 Ch D. 48; 47 L. J. Ch. 192.
(*l*) *Nanney* v. *Martin*, 1 Eq. Cas. Abr. 68.
(*m*) *Bond* v. *Simmonds*, 3 Atk. 20.
(*n*) *Bourne* v. *Crofton*, 2 Moll. 318.

sentatives will have the right to administer (*o*), and if another takes out administration and recovers he is a trustee for the husband (*p*). Since the husband, in order to reduce his wife's choses in action or reversionary interests into possession, frequently had need of recourse to the Court of Chancery, it was the practice of the Court to put him upon terms favourable to his wife before it would part with the fund or property sought to be reduced by him into possession, on the principle that he who seeks equity must do it. This right of the wife to have a provision made for her out of her own property is called her Equity to a Settlement (*q*). Before the passing of Malins' Act (*r*), the husband could not dispose of his wife's reversionary choses in action so as to bar her right of survivorship; but after its passing he and his wife could join in disposing of them (unless she was restrained from anticipating), by conforming with the provisions of the Fines and Recoveries Act, 1834 (*s*).

If the wife's title to her choses in action accrued before the Married Women's Property Act, 1882, came into force, her husband would be entitled to reduce them into possession, though he commence proceedings after the Act has come into force to effect that purpose, and on reduction they would become his absolutely.

Wife's Interest in Husband's Personal Property.—The mere fact of marriage gave the wife no claim to participate in her husband's personal estate during coverture, nor any indefeasible right to share in it after his death.

Wife's Interest in Her Own Personal Property.—At this point a comparatively short exposition of the law will suffice, because some of the same ground will be traversed in the later chapter on Separate Estate. On marriage a woman at common law ceased to have any ownership or interest in her specific chattels which she might possess at the time of marrying or might subsequently acquire. A married woman could not acquire any legal right to personal property during her coverture; and if she had money or goods in her possession, and she lent the one or sold the other, the right to recover the debt or the value of the property thus parted with vested in the husband. If she

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(*o*) *Elliot* v. *Collier*, 3 Atk. 576.
(*p*) *Miners* v. *Lawry*, 60 So. J. 666.
(*q*) For the discussion of this subject, see *post*, p. 193, *et seq.*
(*r*) 20 & 21 Vict. c. 57.
(*s*) 3 & 4 Wm. IV. c. 74. See *City of Glasgow Life Assurance Co., In re, Clare's Policy*, [1914] 84 L. J. Ch. 684.

survived her husband, who died intestate, his personal representative and not herself took his property, though all that he died possessed of might have been derived from her, and she could only claim to share in it by force of the Statute of Distributions (*t*) (now repealed by the Administration of Estates Act, 1925 (*u*)); but when she died intestate possessed of separate estate, her husband took it *jure mariti*. A married woman's interest in her personal property was increased under the Matrimonial Causes Acts (*x*); for if, during a judicial separation, or the currency of a protection order, she acquired property, she acquired it in all respects as if she were a *feme sole*, and on her decease intestate it was to go as though her husband were dead.

Under Married Women's Property Acts.—The Married Women's Property Act, 1870, increased her interest in certain classes of specific chattels enumerated below. The Married Women's Property Act, 1882, provides that in case of marriages on or after January 1, 1883, all chattels personal in possession which belonged to her at the date of the marriage or are afterwards acquired by her remain and become her own separate property, which she can dispose of in any manner she pleases; wages, earnings, money, and property gained or acquired by her separate exertions are included.

A married woman under the Act of 1870 acquired a sole interest in the wages or earnings gained by her in any employment, occupation, or trade which she carried on separately from her husband, and in any money or property gained by her through the exercise of any literary, artistic, or scientific skill, and in all investments of such wages, &c.; and her receipts alone were a good discharge for them (*y*). Her interest was the same whether she carried on the trade at the time of marriage, or afterwards entered into it (*z*). Before this Act her husband could recover and retain as his own property wages due to her; and her receipt, unless as agent for him, was no discharge of the debt (*a*). Her interest in these classes of property was confirmed by the Act of 1882, both as regards women married before and after the Act came into force (*b*).

(*t*) 22 & 23 Car. II. c. 10.
(*u*) 15 Geo. V. c. 23.
(*x*) See now 15 & 16 Geo. V. c. 49, s. 194.
(*y*) Sect. 1.
(*z*) See *Ashworth* v. *Outram*, 5 Ch. D. 923; 46 L. J. Ch. 687; *Lovell* v. *Newton*, 4 C. P. D. 7; *Re Dearmer, James* v. *Dearmer*, 53 L. T. 905.
(*a*) *Offley* v. *Clay*, 3 Scott, N. R. 372.
(*b*) 45 & 46 Vict. c. 75, s. 5.

The sole interest of a married woman in the savings effected by her out of her separate property (*c*), and in the investments of such savings, has always been recognized in equity. Her savings out of her statutory separate property were secured to her by the Married Women's Property Act, 1870; and by the like Act of 1882 she will be entitled to all savings effected by her out of her property, both that which has been rendered her separate property by the Act, and that which before the Act was strictly not her separate property, but out of which she was entitled to put up savings which became her separate property; thus, she will be entitled to accumulations or savings out of the pin-money allowed her, at any rate in such cases as she would formerly have been entitled to the accumulations as her separate property (*d*). But where the wife is living with her husband, and is supported by him, and is allowed a sum for household expenses, and she saves out of it, the recent Act does not confer any interest in these savings upon her, and she will not be entitled to claim them as her own property (*e*). Any damages that a married woman may recover in an action founded on contract or in tort belong to her as her separate property (*f*); and if she bring her action in tort jointly with her husband, any damages recovered in it by her will belong to her as her separate property (*g*).

Wife's Interest in Her Choses in Reversion.—The interest of a married woman in her choses in reversion depends upon the date of her marriage and of the accrual of her title to them. If she was married, and her title to them accrued before the Married Women's Property Act, 1882, came into force, and they fall into possession during coverture, they become the husband's absolutely unless settled to her separate use. If they do not fall into possession during coverture, they survive to her, unaffected by any disposition the husband alone may have made of them, or the claims of his personal representatives. The coverture may be determined not only by death, but by the dissolution or even suspension of the marriage tie; and where a chose in reversion belonging to the wife is not reduced into possession before the marriage is terminated by a decree of

(*c*) *Maddison* v. *Chapman*, 1 J. & H. 470; *Steward* v. *Blakeway*, L. R. 4 Ch. App. 603.

(*d*) See *M'Lean* v. *Longlands*, 5 Ves. 79; *Dixon* v. *Dixon*, 9 Ch. D. 587.

(*e*) See *Slanning* v. *Style*, 3 P. Wms. 338; *Montgomery* v. *Blows*, [1916] 1 K. B. 899, C. A.; 85 L. J. K. B. 794.

(*f*) 45 & 46 Vict. c. 75, s. 1, sub-s. 2.

(*g*) *Beasley* v. *Roney*, [1891] 1 Q. B. 509; 60 L. J. Q. B. 408.

dissolution, the interest of the wife in it remains unaffected by any rights of her late husband (*h*). But where she has married, or her title has accrued since the Act has come into force, her interest in it remains unaffected by any marital right, and she can dispose of it by act *inter vivos*, or by will, just as she can dispose of her specific chattels in possession (*i*).

Power of Disposition under Malins' Act, 1857.—In equity a married woman had a full and complete interest in her reversionary personal property to her separate use, and could dispose of it by deed, if she pleased (*k*). Where the property was reversionary in its nature and not settled to her separate use, she did not possess this disposing power over it; but under Malins' Act (*l*), if she or her husband in her right became entitled by virtue of any instrument made after December 31, 1857 (*m*), to reversionary personal property of any description, she might, unless restrained from anticipating, or bound by her covenant to bring such property into settlement, dispose of her interest in it (with the concurrence of her husband) by deed acknowledged in the manner required by the Fines and Recoveries Act, 1834 (*n*). Such acknowledgment, however, now is abolished by the Law of Property Act, 1925, s. 167. The concurrence of the husband might be dispensed with for certain reasons, such as living apart from his wife and the like (*o*). A due execution of an assignment under this Act was a complete discharge of all marital rights over it (*p*). The disposition under this Act is really that of the wife; therefore the husband is not precluded from validly joining in the conveyance by reason of his bankruptcy (*q*). The disposing power under this Act extends to a chose in action, *e.g.*, a policy of insurance (*r*). Where a husband executed a document in which it was recited that both he and his wife agreed to settle certain reversionary property which was not within the application of Malins' Act,

(*h*) *Wilkinson* v. *Gibson*, L. R. 4 Eq. 162; 36 L. J. Ch. 646.
(*i*) Sects. 1, 2, and 5.
(*k*) *Sturgis* v. *Corp*, 13 Ves. 190.
(*l*) 20 & 21 Vict. c. 57.
(*m*) See *Re Elcom, Layborn* v. *Groves-Wright*, [1894] 1 Ch. 303; 63 L. J. Ch. 392.
(*n*) See *ante*, p. 174. The expectation of taking under the will of a person who is alive at the date of the married woman's disposition is not a future interest within the meaning of the Act. *Allcard* v. *Walker*, [1896] 2 Ch. 369.
(*o*) *Re Rogers*, L. R. 1 C. P. 47; 35 L. J. P. C. 71; but see *Ex parte Cockerell*, 4 C. P. D. 39.
(*p*) *Re Batchelor*, L. R. 16 Eq. 481; 43 L. J. Ch. 101.
(*q*) *Cooper* v. *Macdonald*, 7 Ch. D. 288; 47 L. J. Ch. 373; *Re Jakeman's Trusts*, 23 Ch. D. 344; 52 L. J. Ch. 363.
(*r*) *Witherby* v. *Rackham*, 60 L. J. Ch. 511; 39 W. R. 363.

and which contract was by reason of the Statute of Frauds not binding on the wife, but she recognized it and elected to have the benefit of it, she was held bound by the settlement (*s*).

Effect of Married Women's Property Act, 1882.—The effect of the Married Women's Property Act, 1882, is to render her reversionary property, equally with her realty and her personal chattels, her separate property. She need not now obtain the concurrence of her husband in disposing of it. But women married before January 1, 1883, whose title to their reversionary property accrued before that date, are under the old law and must fulfil its requirements.

Interest of Wife in Her Choses in Action.—The interest of a married woman in her choses in action is not divested by reason of the coverture, but it continues to be her property till her husband succeeds in reducing it into possession (*t*). Her interest in her choses in action under the present state of the law depends, as in other matters, upon the date of her marriage.

If a woman were married, or her title to the chose in action not settled to her separate use accrued, before the Married Women's Property Act, 1882, came into force, her interest in it would depend upon whether or not it was reduced into possession by her husband during coverture. If he fails to reduce it during coverture into his possession, her right to it by survivorship remains good and unaffected. If she has married, or her title to the chose in action has accrued, since the date of the Act coming into force, her interest in it is complete, and in no way subject to marital rights. But if she die intestate, and without having disposed of her choses in action during her lifetime, it is submitted that her husband's right to administer to them will be fully recognized. If, then, a chose in action accruing to a married woman before January 1, 1883, is to be reduced into possession, and an action is necessary for the purpose, it must be brought in the names both of husband and wife (*u*); and on judgment being given for them in the action, the title of the husband to it will be complete. But under the present state of the law, the interest of a married woman in her choses in action of every kind is the same as

(*s*) *Greenhill* v. *North British and Mercantile Insurance Company*, [1893] 3 Ch. 474; 62 L. J. Ch. 918; but see *Harle* v. *Jarman*, [1895] 2 Ch. 419; 64 L. J. Ch. 779.

(*t*) *Purdew* v. *Jackson*, 1 Russ. 1; *Prole* v. *Soady*, L. R. 3 Ch. App. 220. See *Re Barrow's Policy Trusts*, [1918] 1 Ch. 452; 87 L. J. Ch. 310.

(*u*) See *Milnes* v. *Milnes*, 3 T. R. 631.

that in her specific chattels. Marriage does not operate to divest her of her interest in them, or give her husband a power to reduce them into possession, and acquire ownership in them. If she has recourse to legal proceedings to reduce them into possession, she alone may bring the action, and the husband need not be joined (*x*).

The Married Women's Property Acts, 1870 and 1882, have effected an important alteration of the law in favour of married women in respect of certain choses in action; and the latter Act still more extends their privileges. In the future "all deposits in any post-office or other savings-bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the National Debt, or by any other person, and all sums forming part of the public stocks or funds . . . which at the commencement of this Act are standing in the *sole* name of a married woman, and all shares, stocks, debentures, debenture-stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this Act are standing in her name" (*y*), or which after its commencement "shall be allotted to or placed, registered, or transferred in or into or made to stand in the sole name of any married woman, shall be deemed, unless and until the contrary be shown, to be her separate property" (*z*). It is the same with investments standing in the name of a married woman jointly with any person or persons other than her husband (*a*), and the latter need not be made a party to join in the transfer of any such sums, deposits, or securities (*b*). A deposit by a husband of money in his wife's name will *prima facie* be deemed to be her separate property (*c*), though whether she is or is not entitled to the deposit may remain a question to be determined (*d*); the onus of disproof of her title is shifted upon her husband, or those claiming under him. If the married woman has fraudulently taken her husband's money and

(*x*) Sect. 1 (sub-sect. 2), and sect. 24.
(*y*) Sect. 6.
(*z*) Sect. 7.
(*a*) Sect. 8.
(*b*) Sect. 9. This renders the case of *Howard* v. *Bank of England*, L. R. 19 Eq. 295; 44 L. J. Ch. 329, no longer law.
(*c*) *Mews* v. *Mews*, 15 Beav. 529; *Parker* v. *Lechmere*, 12 Ch. D. 256.
(*d*) See *Lloyd* v. *Pughe*, L. R. 8 Ch. App. 88; 42 L. J. Ch. 282.

invested or deposited it in her own name, he may reclaim it, and have it transferred and paid to himself (*e*).

Choses in Autre Droit.—The interest of a married woman in the property which she holds in a representative capacity as executrix or administratrix is dealt with elsewhere (*f*).

Wife's Equity to a Settlement.—In the preceding sections of the present chapter the common law operation of marriage in favour of the husband has been fully set out and discussed. Equity, while recognizing this right of the husband to the personal property of his wife not settled to her separate use, modified it in her favour in order to prevent him from alienating and disposing of all the property to which he might become entitled *jure mariti*, whether to satisfy his own caprice, or, on insolvency, to satisfy the claims of his creditors. It accordingly gave to the wife, under certain circumstances, the right to be suitably provided for out of her own equitable choses in action. This right is called the wife's Equity to a Settlement (*g*). This equity was only enforced in those cases in which the husband was bound to have recourse to the Courts of Equity in order to obtain possession of the property; and the Courts enforced their favourite maxim that "he who seeks equity must do equity," and compelled the husband and those claiming under him to make a settlement of part of the fund on the wife and children. Specific chattels which the husband himself could reduce into possession were not affected by the equity. The equity attached when a decree for a settlement or a contract for a settlement was made (*h*), but an action brought by a third party (*i*) or a decree for administration (*k*) was insufficient.

Effect of Married Women's Property Act, 1882.—The Married Women's Property Act, 1882, has altogether done away with the necessity for enforcing this equitable right of the wife by abrogating the marital right over all and every species of property which may belong to her at the time of marriage, or devolve upon her after marriage; and therefore questions can only arise in connection with instruments coming into operation and marriages taking place before the passing of the Act, but

(*e*) Sects. 10 and 17. As to disputes between husband and wife in respect of their property, see *post*, chap. xiii.
(*f*) See *post*, Contracts of Married Women.
(*g*) *Murray* v. *Elibank*, 10 Ves. 84; 1 W. & T. L. C. 493.
(*h*) See *Wallace* v. *Auldjo*, 1 Dr. & S. 216.
(*i*) *Baker* v. *Bayldon*, 8 Ha. 210.
(*k*) *De la Garde* v. *Lempriere*, 6 Beav. 344.

as such existing rights are left untouched a knowledge of the principles applied by the Courts in considering the subject is not unnecessary.

Principles Applied by the Courts.—This right to a settlement rested on the control which a Court of equity, standing *in loco parentis*, exercises over property falling under its dominion. Strictly speaking, an equity to a settlement arises when a husband makes a claim to the wife's property in a Court of equity; but the wife herself may take proceedings in a Court of equity to assert that equity, whether before or after a claim has been made by her husband (*l*). The consequence of this is that the wife's equity prevails over any right of retainer of a legacy left to her on the part of an executor for a debt due to his testator from her husband (*m*). Equity did not interfere where the husband had the legal title by which he could obtain possession of his wife's personal estate (*n*), and the husband is entitled, where he can, to lay hold of his wife's property, and the Court will not interfere (*o*). The Court exercises its unfettered discretion as to amount, and not for the benefit of the wife only, but for her children, limitations which are wholly inconsistent with a right of property in her (*p*). This equity will be enforced, not only against the husband, but against his trustee in bankruptcy, or a general assignee for the payment of his debts, who will be compelled to make a settlement (*q*), and against an assignee for valuable consideration (*r*), though the position of the latter is more favourable than that of the husband or his general assignee (*s*).

Rights of the Children.—This equity to a settlement, though strictly personal to the wife, was always extended on behalf of her children (*t*), whether they were the issue of a former or the existing marriage, and of full age, and already provided for (*u*).

(*l*) *Wortham* v. *Pemberton*, 1 De G. & S. 644; and see *Re Briant, Poulter* v. *Shackel*, 39 Ch. D. 471; 57 L. J. Ch. 953.

(*m*) *Re Briant, Poulter* v. *Shackel* (*ubi sup.*).

(*n*) *Jewson* v. *Moulson*, 2 Atk. 420.

(*o*) Per Eldon, L.C., in *Murray* v. *Elibank*, 10 Ves. 84-90.

(*p*) Peach. Sett. 158.

(*q*) *Sturgis* v. *Champneys*, 5 Myl. & Cr. 97. See also *Carr* v. *Taylor*, 10 Ves. 574, in which it was decided that the wife's equity was paramount to a right of set-off in respect of a debt due from her husband; but it is otherwise where the wife is joint legatee of a residue, and her husband as executor wastes assets, and is unable to pay his debts to the estate. *Knight* v. *Knight*, 18 L. R. Eq. 487; 43 L. J. Ch. 611.

(*r*) *Macaulay* v. *Phillips*, 4 Ves. 19. (*s*) *Elliott* v. *Cordell*, 5 Madd. 149.

(*t*) *Lady Elibank* v. *Montolieu*, 5 Ves. 737; *Johnson* v. *Johnson*, 1 J. & W. 472; see *Roberts* v. *Cooper*, [1891] 2 Ch. 348, per Kay, L.J.; 60 L. J. Ch. 377.

(*u*) *Conington* v. *Gilliatt*, 46 L. J. Ch. 61; 25 W. R. 69.

Though a wife might have waived her right altogether, she could not have availed herself of it for herself and have given it up for them (*x*); but if she died before asserting her right, her children could not insist upon a settlement (*y*). But if she either entered into such a contract or had had a decree made in her favour, and died without waiving her right (and she could have waived it before it was actually made) (*z*), their interests were preserved, though they were not named in the decree (*a*). Their rights, however, did not exist where their mother, after action brought, died before the decree was made (*b*), and were lost where they had acquiesced for a long time in the fact of their omission from the settlement (*c*).

To what Property the Equity Attaches.—The equity of the wife attached to real and personal property of an equitable nature to which she became entitled before as well as after marriage (*d*), but not such as vested without more in her husband *jure mariti*, though if a purely legal estate became from collateral circumstances the subject of a suit in equity the wife's right at once attached (*e*). Since the Judicature Act, 1873 (*f*), it would seem that the claim by a wife to her equity in a purely legal estate would have effect given to it; in other words, it is immaterial whether her claim arises in respect of a legal or equitable estate (*g*). This right had been long insisted upon in respect of every species of unsettled personalty of the wife of which a settlement could be made (*h*); accordingly, where the property of the wife was equitable, and so not recoverable at law, the husband or his assignees could only have obtained it upon the terms of making a settlement upon the wife and her children, if she required one to be made (*i*). But the right did not attach when the wife's interest in pure personal estate was reversionary in its nature (*k*). Where she

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(*x*) *Briggs* v. *Chamberlain*, 11 Ha. 69.
(*y*) *Scriven* v. *Tapley*. 2 Ed. 337.
(*z*) *Fraser* v. *Taylor*, 2 Russ. & Myl. 190.
(*a*) *Lady Elibank* v. *Montolieu* (*ubi sup.*).
(*b*) *Wallace* v. *Auldjo*, 1 Dr. & Sm. 216; see also *De la Garde* v. *Lempriere*, 6 Beav. 344; *Baker* v. *Bayldon*, 8 Ha. 210, overruling *Steinmetz* v. *Halthin*, 1 G. & J. 64.
(*c*) *Johnson* v. *Johnson*, 1 J. & W. 472.
(*d*) *Barrow* v. *Barrow*, 18 Beav. 529; 24 L. J. Ch. 267.
(*e*) See remarks of Malins, V.-C., in *Ruffies* v. *Alston*, 19 L. R. Eq. 539, 546; 44 L. J. Ch. 308.
(*f*) Sect. 25.
(*g*) Per North, J., in *Fowke* v. *Draycott*, 29 Ch. D. 1013; 54 L. J. Ch. 977.
(*h*) *Barrow* v. *Barrow* (*ubi sup.*).
(*i*) *Milner* v. *Colmer*, 2 P. Wms. 639.
(*k*) *Osborn* v. *Morgan*, 21 L. J. Ch. 318.

takes a joint interest with the husband, the equity does not arise (*l*). This right was extended to realty by Lord Cottenham in the important case of *Sturgis* v. *Champneys* (*m*), in which he reviewed the authorities, and admitted the claim of the wife to have a settlement out of her real estate. The following are a few instances of different kinds of property to which this right was attached: A legacy charged on land with a power of entry and receipt of the rents and profits (*n*), a trust term for years (*o*), an equitable estate tail (*p*), and an estate in fee, but not so as to affect the husband's possible estate by the curtesy (*q*).

A distinction has been made between those cases in which the wife takes an *absolute interest* and those in which she takes a *life interest* only. It has been seen that where her interest is absolute, her right against her husband and his assignees, whether general or particular, and for valuable consideration, has been fully established, not only on her own behalf, but on that of her children (*r*). Where the wife takes an absolute interest, her right to a provision for herself and children is independent of the acts and conduct of her husband; but when she takes a life interest only, this right arises from the non-fulfilment by him of his obligations, and so is dependent on his acts and conduct. Thus her right in the latter case was not always maintained. At first it was doubted whether she was entitled at all to any settlement out of an annuity or a life interest, but that she may be so entitled is now settled (*s*).

Under what Circumstances Equity Exercised.—The question of her equity may arise either between the wife and her husband or between her and her husband's general or particular assignees or creditors. Where the wife is living with her husband, who maintains her, and is neither bankrupt nor insolvent, she is not entitled to this equity, though he is in embarrassed circum-

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(*l*) *Ward* v. *Ward*, 14 Ch. D. 506; 49 L. J. Ch. 409.

(*m*) 5 Myl. & Cr. 97; see also *Freeman* v. *Fairlie*, 11 Jur. 447.

(*n*) *Duncombe* v. *Greenacre*, 28 Beav. 482.

(*o*) *Hanson* v. *Keating*, 4 Ha. 1. In this case not only as against the husband, but as against his assignee for valuable consideration. This overrules the supposed decision in *Sir Edward Turner's Case*, 1 Vern. 7.

(*p*) *Life Assurance of Scotland* v. *Siddal*, 4 L. T. 311.

(*q*) *Smith* v. *Matthews*, 30 L. J. Ch. 445.

(*r*) *Tidd* v. *Lister*, 23 L. J. Ch. 249, on appeal; *Scott* v. *Spashett*, 3 Mac. & G. 599.

(*s*) *Lumb* v. *Milnes*, 5 Ves. 517; *Jacobs* v. *Amyatt*, 1 Madd. 376 *n*; *Sturgis* v. *Champneys*, 5 Myl. & Cr. 97; *Squires* v. *Ashford*, 23 Beav. 132; *Taunton* v. *Morris*, 11 Ch. D. 779; 47 L. J. Ch. 721.

stances, and has nothing to support her except her income (*t*); but she is entitled when deserted by him (*u*).

Where the person against whom the wife could enforce her right is a particular assignee for value of the husband, she will not be permitted to have a settlement out of her life interest decreed in her favour (*x*). This assignment of the life interest of a married woman, unless within the provisions of 20 & 21 Vict. c. 57, cannot operate for any longer period than the joint lives of husband and wife; and if the interest accrues to the wife after coverture, it is reversionary in its nature, and unaffected by the assignment (*y*). But when the husband assigns his wife's interest generally for the benefit of his creditors, her equity will be recognized and enforced (*z*).

The wife has an equity when the interest becomes vested in the husband's general assignees, or trustee in bankruptcy, but not where it is vested in a particular assignee for value, though the assignment in the latter case, unless the woman acknowledge her consent, will operate only during the coverture. The wife also will not be entitled where there has been no assignment, and the husband is maintaining her.

Amount to be Settled.—The amount to be settled is absolutely in the discretion of the Court, and depends upon the circumstances of each case that is brought before its notice (*a*); and equally so whether the wife's interest is absolute, or for life (*b*). As between the husband and wife, the Court will take into consideration the amount of the wife's fortune already received by the husband, or any previous settlement which may have been made (*c*), and where the husband has received half the fund he has been deemed disentitled to receive any more (*d*). Generally speaking, where the husband has been guilty of misconduct (*e*), such as adultery, cruelty, or what may be

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(*t*) *Vaughan* v. *Buck*, 13 Sim. 404.
(*u*) *Gilchrist* v. *Cator*, 1 De G. & Sm. 188. See *Boxall* v. *Boxall*, 27 Ch. D. 220; 53 L. J. Ch. 838.
(*x*) *Wright* v. *Morley*, 11 Ves. 11; *Elliott* v. *Cordell*, 5 Madd. 149; *Tidd* v. *Lister* (*ubi sup.*); *Re Duffy's Trusts*, 28 Beav. 386.
(*y*) *Stiffe* v. *Everitt*, 5 L. J. Ch. 138.
(*z*) *Spirett* v. *Willows*, L. R. 1 Ch. App. 520; 34 L. J. Ch. 365.
(*a*) *Ibid.*
(*b*) *Taunton* v. *Morris* (*ubi sup.*).
(*c*) *Re Suggitt's Trusts*, L. R. 3 Ch. 215; 38 L. J. Ch. 426; *Boxall* v. *Boxall*, 27 Ch. D. 220; 53 L. J. Ch. 838.
(*d*) *Scott* v. *Spashett*, 3 Mac. & G. 599; *Ward* v. *Yates*, 1 Dr. & S. 80.
(*e*) *Dunkley* v. *Dunkley*, 2 De G. M. & G. 390.

termed aggravated misconduct (*f*), or is insolvent (*g*), or the fund is small (*h*), the whole will be settled on the wife.

Waiver and Release of Equity.—The wife may, if she please, waive her equity to a settlement as well as any agreement made in respect of it. She will not be permitted to do so as long as she is under age (*k*), or a ward of Court, and has eloped or married without consent (*l*). Where the wife is willing to forego this right, and the fund exceeds £200 (*m*), her consent had to be formally taken upon her examination in Court (*n*), or under a commission issuing from the Court when she was abroad (*o*). The wife may revoke her consent at any time before the actual transfer (*q*), even though an order of the Court has been made for payment in accordance with it (*r*). Before the property of the wife will be paid over or assigned to the husband, the Court must be satisfied by affidavits that there is no settlement on the marriage affecting the property in question; or if there be a settlement, it must be produced so that the Court may form its own judgment on the point (*s*). The amount of the fund must be ascertained (*t*).

Before the beginning of the year 1858, a married woman was not permitted to part with her reversionary interest in personal property not settled to her separate use; but by 20 & 21 Vict. c. 57 (known as Malins' Act), she might, with the concurrence of her husband (except where under 3 & 4 Wm. IV. c. 74, s. 91, his concurrence may be dispensed with), and under a deed or instrument which before January 1, 1926, had to be duly acknowledged (not being a settlement or agreement for a settlement on her marriage) (*u*), dispose of her personal estate, to which she is entitled in reversion, and also release her equity to a settlement, so as to give the assignee for value an absolute

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(*f*) *Reid* v. *Reid*, 33 Ch. D. 220; 55 L. J. Ch. 756

(*g*) *Scott* v. *Spashett* (*ubi sup.*).

(*h*) *Re Kincaid's Trusts*, 16 Jur. 106.

(*k*) *Stubbs* v. *Sargon*, 2 Beav. 496; *Abraham* v. *Newcome*, 12 Sim. 566; *Shipway* v. *Ball*, 16 Ch. D. 376; 50 L. J. Ch. 263.

(*l*) *Stackpole* v. *Beaumont*, 3 Ves. 89.

(*m*) *Elworthy* v. *Wickstead*, 1 J. & W. 69; *Veal* v. *Veal*, L. R. 4 Eq. 115.

(*n*) *Beaumont* v. *Carter*, 8 L. T. 685.

(*o*) *Tasburgh's Case*, 1 V. & B. 507; but see the course pursued in *Minet* v. *Hyde*, 2 Bro. C. C. 663.

(*q*) *Penfold* v. *Mould*, L. R. 4 Eq. 562.

(*r*) *Watson* v. *Marshall*, 17 Beav. 363.

(*s*) *Britten* v. *Britten*, 9 Beav. 143.

(*t*) *Sperling* v. *Rochfort*, 8 Ves. 180; see also *Packer* v. *Packer*, 1 Coll. 92. The usual form of settlement adopted by the Court is set out in the case of *Spirett* v. *Willows*, L. R. 1 Ch. App. 520; 34 L. J. Ch. 365.

(*u*) *Clarke* v. *Green*, 13 L. T. 38.

title. Acknowledgment and separate examination of a married woman are rendered unnecessary by the Law of Property Act, 1825 (*w*).

When the Equity may be Defeated.—There are many circumstances under which this right of the wife does not arise; some by what may be termed the operation of law, and others the acts of the wife herself, or her husband. Thus she has no equity where the fund has been made the subject of a settlement, or is affected by a provision in it (*x*), or where an adequate settlement has been made upon her (*y*), or where the disposal of the fund is governed by a foreign law which does not recognize this equity (*z*). The equity may be barred by a disposition by the wife under the Fines and Recoveries Act or Malins' Act. It may also be barred by the receipt by the husband or his assignees of the fund, or by a transfer of it by trustees before action brought (*a*); but if an action has been commenced her rights will be preserved (*b*). The wife's conduct in assisting her husband to obtain possession of a fund which has been assigned by him will disentitle her to the equity as against the assignee (*c*). Again, it will not be recognized where she is amply provided for (*d*), or where at the time of her marriage she owed more than the whole amount of her property, and her husband subsequently becomes bankrupt, and the claim to the fund is disputed between herself and his assignees (*e*). In *Barnard* v. *Ford* and *Carrick* v. *Ford* (*f*), it was held that the wife's equity could not be sustained against her own ante-nuptial creditors in proceedings in bankruptcy against her husband. It was further decided that under such circumstances her equity can only arise when an amount equal to the amount of her debts has been provided out of her estate, and therefore the creditors of the bankrupt against whose estate the wife's debts had been proved can set aside a post-nuptial settlement of such property. Lastly, it does not arise where the wife has made false and

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(*w*) 15 Geo. V. c. 20, s. 167.
(*x*) *Brett* v. *Forcer*, 3 Atk. 405.
(*y*) If the settlement is inadequate, such inadequacy must be result of express stipulation. *Salwey* v. *Salwey*, Amb. 692; *Spirett* v. *Willows* (*ubi sup.*).
(*z*) *Sawer* v. *Shute*, 1 Anst. 63 (Prussia); *Anstruther* v. *Adair*, 2 Myl. & K. 513 (Scotland); *Re Marsland* (Isle of Man), 55 L. J. Ch. 581; 34 W. R. 540.
(*a*) *Murray* v. *Lord Elibank*, 10 Ves. 84.
(*b*) *De la Garde* v. *Lempriere*, 6 Beav. 344.
(*c*) *Roberts* v. *Cooper*, [1891] 2 Ch. 335; 60 L. J. Ch. 377.
(*d*) *Giacometti* v. *Prodgers*, L. R. 8 Ch. 338.
(*e*) *Bonner* v. *Bonner*, 17 Beav. 76.
(*f*) L. R. 4 Ch. 247; 38 L. J. Ch 671.

fraudulent representations respecting the fund over which she claims her equity (*g*), or is living in adultery apart from her husband (*h*).

(*g*) *Re Lush's Trusts*, L. R. 4 Ch. 591.

(*h*) *Carr* v. *Eastabrooke*, 4 Ves. 146; but see *Re Lewin's Trusts*, 20 Beav. 378, and *Ball* v. *Coutts*, 1 V. & B. 292, in which the wife was a ward of Court. This rule seems to be otherwise when both husband and wife are living in adultery. *Greedy* v. *Lavender*, 13 Beav. 62.

CHAPTER IX.

PROPRIETARY RIGHTS OF THE SPOUSES CREATED BY THE TERMINATION OF COVERTURE.

SECTION 1.

New Law of Inheritance on Intestacy.

THE Administration of Estates Act, 1925 (*a*), repeals the Statute of Distribution (*b*), all previous Administration of Estates Acts, and Intestates' Estates Acts, and effects a very great change in the law of descent upon intestacy. The provisions apply to the real and personal property of all persons dying after the commencement of the Act, January 1, 1926. The change is in part effected by abolishing all distinctions between the descent of real and personal property. To attain this end it provides (*c*) that all real estate, and notwithstanding any testamentary disposition thereof, shall devolve upon the personal representatives, who are deemed in law heirs and assigns within the meaning of all trusts and powers (*d*).

The Act abolishes (*e*) (a) all existing modes, rules and canons of descent and of devolution by special occupancy or otherwise of real estate or of a personal inheritance, whether operating by the general law or by the custom of gavelkind or borough English or by any other custom of any county, locality or manor or otherwise howsoever; and (b) tenancy by the curtesy and every other estate and interest of a husband in real estate as to which his wife dies intestate, whether arising under the general law or by custom or otherwise; and (c) dower and freebench and every other estate and interest of a wife in real estate as to which her husband dies intestate, whether arising under the general law or by custom or otherwise; provided that where a right to freebench has attached before the commencement of the Act which cannot be barred by a testamentary or other disposition made by the husband, then such right shall unless released remain in force as an equitable interest; and (d) escheat to the Crown or the Duchy of Lancaster or the Duke of Cornwall or to a mesne lord, for want of heirs.

(*a*) 15 Geo. V. c. 23. (*b*) 22 & 23 Car. II. c. 10. (*c*) Sect. 1.
(*d*) Sect. 2. (*e*) Sect. 45.

On the death of a person intestate as to any real or personal estate, such estate shall be held by his personal representatives as to the real estate on trust to sell, and as to the personal estate on trust to sell, call in and convert into money, with power to postpone selling without being liable to account, and so that any reversionary interest be not sold until it falls into possession, unless there is some special reason for sale, and personal chattels (*f*) are not to be sold unless required for want of other assets. After payment of funeral expenses, debts and costs of administration, the remainder other than personal chattels and £1,000 becomes the residuary estate of the deceased. Personal chattels are defined (*g*) as carriages, horses, stable furniture and effects, motor cars and accessories (not used for business purposes), garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament, musical and scientific instruments and apparatus, wines, liquors, and consumable stores, but do not include any chattels used at the death of the intestate for business purposes, nor money or securities for money.

The surviving husband or wife of the intestate, whether with or without issue, shall take the personal chattels absolutely, and in addition the residuary estate (other than the personal chattels) shall be charged with payment of a net sum of £1,000 free of death duties and costs, with interest thereon from the date of the death at 5% per annum, and as to the remainder of the residuary estate if the intestate leave no issue upon trust for the surviving husband or wife for life (*h*).

If the intestate leaves issue the residuary estate is to be held upon trust as to one-half for the surviving husband or wife for life, and subject to such life interest on the statutory trusts for the issue of the intestate, and as to the other half on the statutory trusts for the issue of the intestate, but if those trusts fail or determine in the lifetime of a surviving husband or wife of the intestate, then as to the other half also upon trust for the surviving husband or wife for life. In the event of issue being left but no husband or wife, the residuary estate is to be held on the statutory trusts for the issue, and if no issue is left then to the parents of the intestate absolutely, or if only one survives to that one absolutely. If there are neither issue nor parents left, then on the statutory trusts for the following persons

(*f*) Sect. 33. (*g*) Sect. 55 (1) (x). (*h*) Sect. 46 (1).

living at the death of the intestate who are entitled in the order named: (1) brothers and sisters of the whole blood of the intestate; (2) brothers and sisters of the half-blood; (3) grandparents, and if more than one, in equal shares; (4) uncles and aunts of the whole blood (being brothers or sisters of a parent) of the intestate; (5) uncles and aunts of the half-blood of the intestate, and if no person takes an absolutely vested interest under such trusts then (6) for the surviving husband or wife of the intestate absolutely. In default of any person taking an absolute interest, the residuary estate goes to the Crown or the Duchy of Lancaster or to the Duke of Cornwall as *bona vacantia*, and in lieu of any right to escheat, and in such case the Crown, the Duchy or the Duke, may provide in accordance with the existing practice for dependants, whether kindred or not, of the intestate, and other persons for whom the intestate might reasonably have been expected to make provision.

Power is given to the personal representatives where a surviving spouse is entitled to a life interest, either with the consent of such life tenant, or if he is the sole personal representative, with the leave of the Court, to redeem the life interest by payment of its capital value reckoned on tables selected by the personal representative (*i*).

This new law of descent of, and succession to, property upon intestacy only applying to deaths occurring after the commencement of the Act, there will naturally be for many years to come questions arising as to the rights under intestacies occurring before that date, and in connection with such rights the following outline of the law, although of somewhat limited application, may still be useful.

The rights of the spouses in each other's property which came into existence at the moment of the termination of the coverture by death, where the death occurred before January 1, 1926, fall into two main sections, the first Real Property, and the second Personal Property.

SECTION 2.

Interest of Husband in Wife's Realty, Curtesy.—The husband had an inchoate right given to him by the general law of the land to a life interest in his wife's freehold (*k*) estates of inheri-

(*i*) Sect. 48.

(*k*) The husband may have curtesy out of her copyholds if it is the custom of the manor that he may have it; but the custom must be strictly observed.

tance on the birth of a child capable of inheriting them; and the death of the child before the determination of the coverture, or before the seisin of the wife, did not affect his right. This *inchoate* right was turned into a *consummate* or perfect right by the death of the wife, in cases where the property had not been disposed of during the coverture. There were four requisites for an estate by the curtesy, namely, a valid marriage; birth of a child capable of inheriting the lands; sole seisin of the wife during coverture (*l*); and death of the wife. The marriage must be one recognized by the law of the land. The child must be born alive, though it would be sufficient if it only survived its birth a few moments (*m*): it must also at the time of its birth be capable of inheriting; thus, if the estate was limited in tail male the birth of a daughter would not cause the right to spring into existence; and where the estate was so limited that the issue of the wife would take as purchasers and not by descent, the husband's curtesy right did not attach (*n*).

There is in law a twofold seisin, a seisin in deed, and a seisin in law; and the seisin for curtesy is that "in deed," "if it may be attained unto" (*o*). Thus, there must be some sort of entry into possession by the wife, if possible; and there was no inchoate right to curtesy until the wife becomes entitled to an estate of inheritance in possession (*p*). In some cases the seisin must necessarily be "in law," as where the estate consists of an incorporeal hereditament, such as an advowson in fee, or a rentcharge, of both of which a husband may have his curtesy (*q*).

Entry is not always required where a seisin "in deed" is impracticable, and the husband was held entitled by the curtesy to lands on which there were leases for years existing, and a rent which had accrued descended on the wife, who survived after the rent day accrued, though she made no entry, nor received any rent at all (*r*). Momentary seisin, too, is enough (*s*); and where, through no fault of the husband, actual seisin had not taken place, as, for instance, where a devise to a daughter who dies leaving issue in the lifetime of the testator,

(*l*) The husband has no right of curtesy in respect of his wife's freehold estate held by her in joint tenancy, though his right does exist where her tenancy is only in common. 1 Rop. H. & W. 11; Burt. Comp. pl. 353.
(*m*) Co. Litt. 29 b.
(*n*) *Ibid.*
(*o*) *Barker* v. *Barker*, 2 Sim. 249.
(*p*) *Gibbins* v. *Eyden*, L. R. 7 Eq. 371; 38 L. J. Ch. 377.
(*q*) Co. Litt. 29 a; *Dethick* v. *Bradburne*, 2 Sid. 110.
(*r*) *De Grey* v. *Richardson*, 3 Atk. 469.
(*s*) *Parker* v. *Carter*, 4 Ha. 400.

takes effect by force of section 33 of 1 Vict. c. 26 (The Wills Act, 1837); in such a case the husband, who by no possibility could have obtained seisin during the lifetime of the testator or of his wife, shall yet have his curtesy (*t*). The tenant by the curtesy may exercise the powers conferred by the Settled Estates Act, 1877 (*u*), and the still wider powers of the Settled Land Act, 1882 (*x*); in the latter case by means of the fiction that his estate arises under a settlement made by his wife (*y*), and he is one of the persons enumerated in section 20 of the Settled Land Act, 1925 (*z*), as a person with the powers of a tenant for life.

The husband's curtesy right attached not only to her legal but also to her equitable estates (*a*). Where the wife's estate was settled to her separate use, legally or by way of trust, it had been a contested point whether the husband's right attached to such estate in the event of the wife not having disposed of it during the lifetime or by will, as she might have done. It was settled, however, that where a married woman had an estate of inheritance limited to her separate use, and did not dispose of it by deed or will, her husband, unless his right was expressly excluded, was entitled to curtesy in respect of it (*b*). But where an estate had been limited by will in trust to her for life with a general power of appointment (which she did not exercise) with remainder to her heirs, and she died intestate, her husband's curtesy rights did not attach, for the rule in *Shelley's Case* (*c*) did not apply so as to cause a merger of the two estates, thereby creating the fee-simple in her (*d*). The husband's curtesy rights were not taken away by the Married Women's Property Act, 1882, for though the Act interferes with the husband's rights as regards the acquiring, holding, and disposing of the wife's property, it did not contain any indication of an intention to exclude his rights as regards the devolution of her property on the wife's intestacy (*e*). The statutory separate use is just as much

(*t*) *Eager* v. *Furnivall*, 17 Ch. D. 115; 51 L. J. Ch. 537.
(*u*) 40 & 41 Vict. c. 18.
(*x*) 45 & 46 Vict. c. 38. For the powers conferred by these two Acts, see *post*, Part III., Guardian and Ward, chap. vi.
(*y*) 47 & 48 Vict. c. 18, s. 8 (The Settled Land Act, 1884).
(*z*) 15 Geo V. c. 18.
(*a*) *Follett* v. *Tyrer*, 14 Sim. 125.
(*b*) *Cooper* v. *Macdonald*, 7 Ch. D. 288; 47 L. J. Ch. 373; *Appleton* v. *Rowley*, L. R. 8 Eq. 139; *Morgan* v. *Morgan*, 5 Madd. 408; *Follett* v. *Tyrer* (*ubi sup.*); *Roberts* v. *Dixwell*, 1 Atk. 607; Lewin, 829. The case of *Cooper* v. *Macdonald* (*ubi sup.*) decisively overrules *Hearle* v. *Greenbank*, 3 Atk. 695; and *Moore* v. *Webster*, L. R. 3 Eq. 267; 36 L. J. Ch. 429, which were decided to the contrary.
(*c*) Now abolished by the Law of Property Act, 1925, s. 131.
(*d*) *Re Hart's Estate, Orford* v. *Hart*, W. N. (1883), 164.
(*e*) *Hope* v. *Hope*, [1892] 2 Ch. 336; 61 L. J. Ch. 441.

exhausted by the termination of the coverture as the purely equitable separate use was before the Act passed. It was in the power of the wife by act *inter vivos* or by will to defeat her husband's curtesy rights. The fee-simple interest of a married woman and her husband's curtesy right in her real property did not constitute a limitation for more than one person so as to create a settlement within section 2, sub-section 1, of the Settled Land Act, 1882, and therefore the married woman is not a tenant for life under that Act (*f*), nor under section 1 of the Settled Land Act, 1925 (*ff*).

Wife's Interest in Husband's Realty. Dower.—When a man possessed any estates of inheritance, and married, or if after marriage he acquired any such estates, and died leaving a widow, she was entitled to a provision, amounting to one-third, out of these estates; and her right was called her Dower. This dower-right, as will be seen, has not nowadays much resemblance to that which existed in earlier times, but still remains in a modified shape. It remains in the case of women married before the Married Women's Property Act came into force, and whose husbands died before January 1, 1926, the commencement of the Law of Property Act, 1925.

Dower has been thus variously defined: "Tenant in dower is where a man is seised of certain lands and tenements in fee-simple, fee-tail general, and as heir in special tail, and taketh a wife and dieth; *the wife*, after the decease of her husband, *shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture*, to have and to hold to the same wife in severalty by metes and bounds for term of her life" (*g*).

"Dower, in the common law, is taken for that portion of lands or tenements which the wife hath for term of her life of the lands or tenements of her husband after his decease, for the sustenance of herself and the nurture and education of her children" (*h*).

"The reason why the law gave the widow dower will appear, if we consider how the law stood anciently, for by the old law, if this provision had not been made, and the party at the marriage had made no assignment of dower, the wife would have been without any provision, for the personal estates, even of the richest, were then very inconsiderable; and before trusts were

(*f*) *Bates* v. *Kesterton*, [1896] 1 Ch. 159; 65 L. J. Ch. 108.
(*ff*) 15 Geo. V. c. 18. (*g*) Litt. s. 36. (*h*) Co. Litt. 30 b.

invented, which is but lately, the husband could give his wife nothing, during his own life, nor could he provide for her by will, because lands could not be devised, unless it was in some particular places by the custom, till the statute of Henry VIII." (*i*). Strictly speaking, the right to dower has nothing whatsoever to do with the nurture and education of children, for the widow is entitled to it though she be childless; it was intended solely as a provision for herself.

There were originally five kinds of dower: (1) At common law; (2) by custom; (3) *ad ostium ecclesiæ*, or at the church porch; (4) *ex assensu patris*; (5) *de la plus belle*. This last was a conveyance of tenure by knight service, and was abolished by the Act of Charles II., which did away with tenure in chivalry (*k*). The dower at the church porch (though surviving in the marriage service), and that *ex assensu patris* had long become obsolete, and were finally done away with by the Dower Act, 1834 (*l*). This same Act has much modified dower at common law and by custom.

There were four requisites for dower:

(a) There must have been a marriage between the man and woman; a voidable marriage, however, not disaffirmed during the lifetime of both parties, is enough to support the widow's claim; but the marriage must not be void (*m*):

(b) A possibility of inheritable issue:

(c) Seisin, or possession, on the part of the husband, was formerly a requisite. It was not necessary in all cases that the husband should have entered actually on the corporeal property, or enjoyed the profits of the incorporeal, in order to entitle his widow to dower. But the husband must be *solely* and not *jointly* entitled to the property over which dower is claimed. Since the Dower Act, seisin is no longer a requisite:

(d) Death of the husband.

To what Property it Attached.—Dower attached to all property of which the husband was at any time seised during the coverture. "Dower may be claimed out of all corporeal hereditaments, and out of all incorporeal hereditaments that savour of the realty, that is, which issue out of corporeal ones, or which concern, or are annexed to, or may be exercised within the

(*i*) Note by editor of the 11th edition of Co. Litt., preserved in subsequent editions. Co. Litt. 30 b.
(*k*) 12 Car. II. c. 24.
(*l*) 3 & 4 Wm. IV. c. 105, s. 13.
(*m*) For what are void and voidable marriages, see *ante*, chap. iii.

same" (*n*); thus, the widow was entitled to be dowered out of rents, estovers, commons, advowsons, fairs, tithes, woods (*o*), mills, piscaries, tolls arising from public navigable rivers. She is also dowable of mines and minerals worked in the husband's life-time, but not of mines unopened (*p*). She was dowable of shares in a company when they were in the nature of real estate, such as those of the New River (*q*). Where she was dowable of lands which had been purchased under the Lands Clauses Act, and the purchase-money (a specific portion of which was agreed to be an equivalent for her right of dower) had been paid into Court, she was entitled to be paid the value of her right of dower out of the *corpus* of the fund (*r*). The widow took the crops growing from the seeds sown by her husband on the lands assigned to her as dower; she was also entitled to and might dispose of emblements (*s*). The estate or interests of the husband must be a freehold, whether an estate in fee or in tail, but not a mere life interest, on the principle, that when the interest of the husband ceased on his death, the wife could not stretch such an estate to continue for her life. An estate for years might possibly last for long after the husband's death, but as it was not a freehold estate, the widow's right did not attach to such an interest.

Until the passing of the Dower Act (*t*), the wife was not dowable of property in which her husband had only an equitable interest, for the theory that dower existed solely by force of the common law was all powerful; and as the latter did not recognize trust estates, so it could not recognize dower out of them, and equity did not assist the wife (*u*). Under that Act she could claim it out of estates in which her husband had only a beneficial interest (*x*).

Dower by Various Customs.—Lands held in gavelkind tenure

(*n*) 1 Rop. H. & W. 342.

(*o*) If timber is cut down before dower is assigned, she is entitled to a third of the interest upon the proceeds of the sale during her life. *Bishop* v. *Bishop*, 10 L. J. Ch. 302.

(*p*) *Dicken* v. *Hamer*, 29 L. J. Ch. 778.

(*q*) See *Drybutter* v. *Bartholomew*, 2 P. Wms. 127; but see the Metropolis Water Act, 1902 (2 Edw. VII. c. 41), s. 9, the effect of which is to substitute "water stock" of the Board created by the Act for the former shares of the New River Company.

(*r*) *Re Hall's Estate*, L. R. 9 Eq. 179; 30 L. J. Ch. 392.

(*s*) 20 Hen. III. c. 2, Statute of Merton.

(*t*) 3 & 4 Wm. IV. c. 105.

(*u*) *Lady Radnor* v. *Vandebendy*, Show. Parl. Cas. 69. This case arose on a question of setting aside a trust term for years, which prevented Lady Radnor's dower from attaching, and the House of Lords refused a decree setting it aside as against a purchaser, though with notice.

(*x*) Sect. 2.

were subject to dower, which amounted to one half of the husband's estate so held; but the widow's right lasted only so long as she continued chaste and unmarried (*y*). The Dower Act extended to gavelkind lands (*z*).

By the custom of Borough English, the widow took the whole of her husband's lands holden by that tenure for dower (*a*).

Copyholds.—Copyholds are enfranchised as from January 1, 1926, under the Law of Property Act, 1922 (*b*), subject to the preservation of some manorial incidents, and all land including land held in free tenure but subject to custom is to be dealt with as land held in free and common socage discharged from custom.

The enfranchisement of copyholds, and the conversion into long terms of perpetually renewable leaseholds, and of leases for lives or of leases for years terminable with life or lives or on marriage, effected by the Law of Property Act, 1922, as amended by any subsequent enactment, are to be deemed to have been effected immediately before the commencement of the Law of Property Act, 1925, *i.e.*, on January 1, 1926 (*c*). Enfranchisement, however, is not to affect a right to freebench which has attached before January 1, 1926, and which cannot be barred by the husband. This remains in force under the Administration of Estates Act, 1925, s. 45, as an equitable interest.

Where the lands were copyhold in their nature, the widow's right was called freebench. Before freebench could attach, the husband must have been admitted as copyholder (*d*). This right depended wholly on the special custom of the manor (*e*), and the custom regulated the amount which she took—whether a third, or a half, or even the whole (*f*). Her rights also varied in different manors as to what lands they should attach to. In some manors freebench attached only to those lands of which her husband should *die seised*, rendering her rights generally subject to his disposition (*g*); and a mere devise without a surrender to the use of the will was, under section 3 of the Wills Act, a bar to freebench (*h*). In others it attached to lands of which he should be at any time seised. Freebench was not affected by the Dower

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(*y*) Bac. Abr. Gavel. A.
(*z*) *Farley* v. *Bonham*, 30 L. J. Ch. 239; 2 J. & H. 177.
(*a*) 1 Br. H. & W. 328.
(*b*) 12 & 13 Geo. V. c. 16, s. 128.
(*c*) 15 Geo. V. c. 20.
(*d*) *Smith* v. *Adams*, 24 L. J. Ch. 258; 5 De G. M. & G. 712.
(*e*) 2 Watk. Copy. 72.
(*f*) *Ibid.* 87. (*g*) *Ibid.* 73.
(*h*) *Lacey* v. *Hill*, 4 Ch. D. 537; *Leney* v. *Hill*, L. R. 19 Eq. 346; 44 L. J. Ch. 215.

Act (*i*), consequently she was not dowable of his equitable copyhold estates, nor was it liable to satisfy her husband's debts (*k*).

Rights and Liabilities of Dowager.—The widow was entitled to be endowed immediately after her husband's death; and dower ought to be assigned to her within forty days after the happening of that event. In the meantime, she was entitled at the common law, confirmed by *Magna Charta*, to remain in her husband's capital messuage, or other dwelling-house, of which she was dowable, for the space of forty days, and to be supported *de bonis viri*. This right of residence was called the widow's "quarantine." But if she marry during these days, or depart from her husband's house (to which she will not be permitted to return for the remainder of the term), her right to quarantine determined (*l*). The widow was entitled to emblements (*m*), but the widow of a copyholder who forfeited her freebench by a second marriage was not entitled to the emblements (*n*). Under the Settled Estates Act, 1877 (*o*), a tenant in dower might demise any part of her dower lands (except the principal mansion-house, &c.), for any term not exceeding twenty-one years in England and thirty-five in Ireland, to take effect in possession at or within one year next after the making. Such demise had to be by deed, to reserve the best obtainable rent, without any fine or benefit in the nature of a fine, was not to be made without impeachment of waste, and, among other things, had to contain a condition of re-entry on non-payment of rent.

The dowager was liable for waste committed by herself or strangers (*p*), and to contribute a proportional share to keep down the interest of charges on the property (*q*). Where there is a mortgage over the property which has been assigned to her in dower, she is liable to be called upon for the payment of the whole debt, or to be foreclosed (*r*). If she discharge the demand she will be at liberty to hold the estate until she be reimbursed what she paid beyond her proportion as tenant for life of a third part of the lands (*s*).

The widow was entitled to have a proper quantity of lands assigned to her to satisfy her dower right; it sometimes happened

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(*i*) *Smith* v. *Adams*, 24 L. J. Ch. 258; *Powdrell* v. *Jones*, 21 L. J. Ch. 123; 2 Sm. & G. 407.
(*k*) *Spyer* v. *Hyatt*, 20 Beav. 621.
(*l*) 1 Br. H. & W. 363.
(*m*) 20 Hen. III. c. 2, Statute of Merton.
(*n*) *Oland's Case*, 5 Rep. 116.
(*o*) 40 & 41 Vict. c. 18.
(*p*) Co. Litt. 53, 54; 2 Inst. 303; Fitz. N. B. 55 E. 56 F.
(*q*) Rop. H. & W. 371, 376.
(*r*) See *Jones* v. *Griffiths*, 2 Coll. N. C. 207.
(*s*) 1 Rop. H. & W. 372; *Palmes* v. *Danby*, Prec. Ch. 137.

that an excessive quantity was assigned to her; when an excessive assignment was made by the heir, when of full age, it bound him and he could not be relieved against it at law (*t*), but now in equity he can be relieved. If he were under age when he assigned dower, he was protected against the consequences of an excessive assignment, and entitled to a readjustment of the lands (*u*).

The widow might enforce her right to dower or freebench by proceedings at law, and claim arrears of dower, but not for more than six years (*x*). The jurisdiction of equity was increased by the operation of the Dower Act, 1834 (*y*), which rendered the widow dowable out of her husband's trust estates.

Barring Dower.—When the right of dower had once attached to the lands of the husband, it adhered to them, notwithstanding any sale or devise which the husband might make. It consequently became necessary for the husband, whenever he wished to make a valid conveyance of his lands, to obtain the concurrence of his wife for the purpose of releasing her right to dower. This release could be effected only by means of a fine, in which the wife was separately examined. And when, as often happened, the wife's concurrence was not obtained on account of the expense involved in levying a fine, a defect in the title obviously existed so long as the wife lived (*z*).

"In order to prevent the inconvenient right of the wife attaching to newly purchased lands, and to enable the purchaser to make a title at a future time without his wife's concurrence, various devices were resorted to in the framing of purchase deeds and other instruments.

Among the methods were a conveyance to the husband and a trustee in joint tenancy, a conveyance to uses to bar dower, or an assignment of a satisfied term to a purchaser.

Another method of barring the wife's dower was by a provision made for her in lieu of dower called Jointure. By the Statute of Uses, now repealed by the Law of Property Act, 1925, the wife would not be entitled to dower where she had a jointure settled upon her (*a*). Jointure has been defined to be "a competent livelihood (*b*) of freehold (*c*) for the wife, of lands or

(*t*) 1 Br. H. & W. 381.
(*u*) *Ibid.* 382.
(*x*) 3 & 4 Wm. IV. c. 27, s. 41
(*y*) *Ibid.* c. 106.
(*z*) Williams, Real Property, 315.
(*a*) Sects. 6-10.
(*b*) The adequacy is not defined by the Statute of Uses. *Drury* v. *Drury*. 2 Eq. 39.
(*c*) A jointure of a copyhold estate is no bar at law of dower, but otherwise in equity. *Warde* v. *Warde*, Amb. 299.

tenements, to take effect presently in possession or profit after the death of her husband, for the life of the wife at least, if she herself be not the cause of determination or forfeiture of it" (*d*).

"A jointure, strictly speaking, signifies a joint estate limited to both husband and wife, but in common acceptation extends also to a sole estate limited to the wife only" (*e*).

The following are the chief requisites of a good legal jointure (*f*): (1) The jointure must commence immediately after the husband's death; *prima facie* it is a provision that is to take effect on the husband's death (*g*), though a provision by way of jointure may be limited to take effect in the husband's lifetime (*h*). (2) It must be limited to the wife solely, or to her and her husband jointly. (3) It must be for her life or greater estate, or be determinable by her own act (*i*). An estate limited to the wife *pur autre vie* is not a good jointure within the statute (*k*). (4) It must be made before marriage; if after, it is voidable at her election on her husband's death (*l*). (5) The jointure must be expressed to be in satisfaction of dower, that is, of her whole dower, and not of part of her dower (*m*). (6) At law the jointure cannot be out of a trust estate, but otherwise in equity (*n*), where she will have like remedies as at law.

A power given to a man to appoint to a wife is in the nature of a power to grant a jointure (*o*), but is not so wide in its operation, and may be exhausted by him by an act inconsistent with its exercise (*p*).

An infant wife is bound to a jointure which operates as a proper and adequate provision, on the principle that the jointure takes effect, not as a matter of contract, but as a provision made by the husband, and by force of the Statute of Uses making it effectual (*q*).

The wife's elopement or adultery does not *per se* bar her right to her jointure (*r*).

(*d*) Co. Litt. 36 b.
(*e*) 2 Bl. Com. 137.
(*f*) Rop. H. & W. 464 *et seq.*
(*g*) See *Re De Hoghton* v. *De Hoghton*, [1896] 2 Ch. 385; 65 L. J. Ch. 528.
(*h*) See *Jamieson* v. *Trevelyan*, 10 Exch. 269; 23 L. J. Ex. 281.
(*i*) *Vernon's Case*, 4 Rep. 3 a. In this case it was *durante viduitate*.
(*k*) Co. Litt. 36 b.
(*l*) *Frank* v. *Frank*, 3 Myl. & Cr. 17.
(*m*) Co. Litt. 36 b. *Tinney* v. *Tinney*, 3 Atk. 8.
(*n*) *Corbet* v. *Corbet*, 1 Sim. & S. 620.
(*o*) *Re Lindo, Askin* v. *Ferguson*, 59 L. T. 462.
(*p*) *Re Hancock, Malcolm* v. *Burford Hancock*, [1896] 2 Ch. 173; 65 L. J. Ch. 276.
(*q*) *Simson* v. *Jones*, 9 L. J. Ch. 106; 2 Russ. & Myl. 365.
(*r*) *Seagrave* v. *Seagrave*, 13 Ves. 443.

Where the jointress releases her estate charged with her jointure, and accepts income arising from the investment of the proceeds of the sale, such income being at the time equal to the jointure, any deficiency that may subsequently occur must be made good to her (*s*).

Release of Jointure.—Where the wife releases her jointure lands to enable her husband to mortgage, her right will subsist as against the equity of redemption (*t*), and she may release a part of such lands, and the release will not operate as a release of the whole (*u*). A husband who is a tenant for life and has a power of charging his real estate with a jointure can make a post-nuptial bargain with his wife to exercise that power provided that she alone is benefited by it, though he himself receives consideration from her for its exercise, which exercise will not be regarded as a fraud on the power (*x*). A bargain which entitled persons other than the wife to share in the jointure would be held bad; and the exercise of a power of jointuring under such circumstances by a tenant for life would be invalid against the remainderman (*y*).

The Dower Act, 1833.—This Act (*z*) rendered the law of dower and jointures of little moment and importance, for it put complete power into the hands of the husband to deprive the wife of any interest in his lands.

Section 3.

Personal Property.

Right of Husband to Administer Wife's Estate.—Under the former state of the law, on the death of the wife, the husband had no need to take out letters of administration to her specific chattels, such as money, and other like things, of which she died intestate, for these vested in him by marital right (*a*); but he had to take out letters of administration where there were choses in action belonging to her unrecovered at her death, or chattels real not vested in him in her right in her lifetime. The right

(*s*) *Arundell* v. *Arundell*, 1 Myl. & K. 316.
(*t*) *Wood* v. *Wood*, 7 Beav. 183.
(*u*) 22 & 23 Vict. c. 35, s. 10; see *Noyes* v. *Pollock*, 32 Ch. D. 53; 55 L. J. Ch. 513.
(*x*) *Baldwin* v. *Roche*, 5 Ir. Eq. Rep. 110; *Saunders* v. *Shafto*, [1905] 1 Ch. 126; 74 L. J. Ch. 110, which latter case overruled *Whelan* v. *Palmer*, 39 Ch. D. 648; 57 L. J. Ch. 784.
(*y*) *Saunders* v. *Shafto*, [1905] 1 Ch. 126; 74 L. J. Ch. 110.
(*z*) 3 & 4 Wm. IV. c. 105.
(*a*) *Molony* v. *Kennedy*, 10 Sim. 254; *Tugman* v. *Hopkins*, 4 M. & G. 389.

of the husband in his wife's separate property was much the same, because the quality of separate estate lasts only during coverture: "the separate use is exhausted when the woman has died without making a disposition" (*b*). The wife, of course, might defeat her husband's interest in the property. Thus, if the instrument creating the separate use did not make any disposition of the property to take effect after the wife's death, and she had absolute control over it, and did not make any disposition of it by deed or will, and the husband survived, his position with reference to her property, whether real (*c*) or personal (*d*), including vested leaseholds (*e*), and reversionary leaseholds (*f*), was the same as if it had never been settled to her separate use (*g*), and he took such property *jure mariti* without taking out administration to her estate.

The right of the husband was expressly confirmed by the statute 29 Car. II. c. 3, which enacted that the Statute of Distributions (22 & 23 Car. II. c. 10) "shall not extend to the estates of *femes covert* that shall die intestate, but that their *husbands may demand and have administration* of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said Act." This right of administration to the wife is not an ecclesiastical, but a civil, right of the husband, though it is a right to be administered in the Court of Probate (*h*). But where the wife had been judicially separated, or had obtained a protection order, administration was decreed to her next-of-kin of the property acquired by her since the judicial separation or desertion to the exclusion of the husband (*i*). Where a decree of divorce is made absolute, then the husband lost his right to administer to his wife's estate (*k*). So, too, where the wife was executrix to another and died intestate, administration as to goods not administered by her in that capacity was not, generally speaking, granted to her husband (*l*). A husband as such is not

(*b*) Per Jessel, M.R., in *Cooper* v. *Macdonald*, 7 Ch. D. 288, 296; 47 L. J. Ch. 373.
(*c*) *Cooper* v. *Macdonald* (*ubi sup.*).
(*d*) *Johnstone* v. *Lumb*, 15 Sim. 308; *Molony* v. *Kennedy* (*ubi sup.*).
(*e*) *Surman* v. *Wharton*, [1891] 1 Q. B. 491; 60 L. J. Q. B. 233.
(*f*) *Re Bellamy, Elder* v. *Pearson*, 25 Ch. D. 620; 52 L. J. Ch. 174.
(*g*) Macq. H. & W. 318.
(*h*) 1 Wms. Exors. 297, 319, and the cases there cited.
(*i*) *Re the Goods of Worman*, 29 L. J. P. M. & A. 164; 5 Jur. (N.S.) 687.
(*k*) See *In the Goods of Worman* (*ubi sup.*).
(*l*) 1 Wms. Exors. 326. This was on the principle that the administration was not of the goods of the wife, but *de bonis non* of her testator, *cum testamento annexo*, and the grant of the administration would naturally follow the interest.

"next-of-kin" to his wife under the Statute of Distributions; therefore though his title under ordinary circumstances was paramount, yet he would not take under a bequest to "such persons as would be entitled as next-of-kin or otherwise under the Statute of Distributions" to the personal estate of his wife (*m*).

Where the husband took his wife's specific chattels *jure mariti*, he was entitled to retain them as his own property; but when he was obliged to take out letters of administration to reduce her choses in action into possession, he was deemed to be a trustee of such property on behalf of her creditors, and he could lay claim only to the surplus after satisfying her liabilities. Apart from any question of liability for the debts of his wife, it was the intention of the Legislature in passing the Statute of Frauds (*n*), removing a doubt on the construction of the Statute of Distributions (*o*), that on the death of the wife intestate, the husband and not her next-of-kin should have the right of administering to her undisposed-of property, including her choses in action (*p*). If a married woman attempted to dispose by will of property over which she had no testamentary capacity her executor held such property as trustee for her husband (*q*). Another difference is to be noticed between the right of the husband over the specific chattels of his wife, and over her choses in action as to which she died intestate. At the moment of her death intestate, in the case of the first kind of property, they passed without more by the mere operation of law into the possession of the husband; but if, in the case of the second class of property, the husband died intestate before reducing them into possession, double administration on the part of his next-of-kin was necessary; they must first take out letters of administration to his estate to constitute themselves his legal personal representatives, and then afterwards take out letters to administer his wife's estate (*r*). But where the benefical interest in the property, as under a settlement, is in the next-of-kin, then administration will be granted to them and not to the husband's representatives (*s*). Where letters of administration

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(*m*) *Milne* v. *Gilbart*, 2 De G. M. & G. 715; *Re Norman's Trusts*, 3 De G. M. & G. 965. See also *Miners* v. *Lawry* (1916), 60 S. J. 666.

(*n*) 29 Car. II. c. 3, s. 25. (*o*) 22 & 23 Car. II. c. 10.

(*p*) *Squib* v. *Wyn*, 1 P. Wm. 378.

(*q*) See *Smart* v. *Tranter*, 43 Ch. D. 587; 59 L. J. Ch. 363.

(*r*) *Re the Goods of Harding*, L. R. 2 P. D. 394; 41 L. J. P. M. & A. 65.

(*s*) *Re the Goods of Pountney*, 4 Hagg. 289. See *Partington* v. *Att.-Gen.*, L. R. 4 H. L. 100.

have been improperly granted to a wife's next-of-kin without the knowledge of the husband, he is entitled to have them revoked without proving fraud on the part of those to whom they were granted (*t*). But where a husband deserts his wife, who makes a will without appointing an executor, administration *cum testamento annexo* may be granted without his being cited (*u*).

The above is a short exposition of the law in relation to the husband's right to administer his wife's estate unaffected by any change wrought by the Married Women's Property Act of 1882. Section 25 of the Divorce Act, 1857 (*x*), provides that property acquired by a married woman during a judicial separation "on her decease . . . shall, in case she shall die intestate, go as the same would have gone *if her husband had been then dead*," and the Court has acted upon this provision (*y*). No such words are to be found in the Act of 1882, but it refrained from saying that the husband was not the proper person to administer her estate, and did not deprive him of the right to do so. There is an excellent reason for the provision in the Divorce Act, namely, that as the husband has been in fault, and obliged his wife to have recourse to the protection of the Court, he ought not on her death to seize upon the property which she may have become entitled to or earned during the separation, and their relations to one another are practically those of strangers. The Act of 1882 was not directed against the husband's misconduct, but only against his absolute right, and it has been decided that the Act did not deprive him of his right to administer his wife's undisposed-of personal estate (*z*). The Act perhaps introduced a modification of his right to administer; one of the obvious aims of the Act is to assist the wife's creditors, and to prevent the rules of law from defeating their just claims. The effect of this would be that the husband must administer his wife's estate before he can claim her specific chattels and chattels real, just as he must administer in order to reduce her choses in action into possession, and he will hold her chattels personal in possession as trustee for her creditors, and will be entitled to retain the balance only after

(*t*) *Copeland* v. *Simister*, [1893] P. 16; 62 L. J. P. 38.
(*u*) *In the Goods of Shoosmith*, [1894] P. 23; 63 L. J. P. 64.
(*x*) 20 & 21 Vict. c. 85. See now Supreme Court of Judicature (Consolidation) Act, 1925, s. 194.
(*y*) See *Re the Goods of Worman*, 29 L. J. P. M. & A. 164; 5 Jur. (N.S.) 687; *In the Goods of Byrne*, 84 L. T. 570.
(*z*) *Re Lambert's Estate, Stanton* v. *Lambert*, 39 Ch. D. 626; 57 L. J. Ch. 927.

paying them what is due and owing (*a*). The debts of her creditors will be paid *pari passu* (*b*). The Act did not affect the husband's right to take *jure mariti* his wife's specific chattels and chattels real vested in her before the Act came into force (*c*).

If the husband were cited and did not choose to appear he might be passed over and administration granted to the wife's next-of-kin (*d*). This right to administer his wife's estate was not one that vested in his trustee in bankruptcy (*e*); though under certain circumstances the Court would grant administration to his trustee (*f*); as where the deceased's estate was small. The Court in such an instance would dispense with the citation of the husband and the next-of-kin (*g*).

Formerly, if a *feme covert* made a will and disposed of only part of her separate property, since her executors did not take *jure representationis*, but as appointees under a power to the extent of the fund appointed, they did not take the undisposed-of part, and the husband took that portion of it which consisted of specific chattels *jure mariti*, and that which consisted of choses in action after taking out letters of administration (*h*). Since the coming into force of the Married Women's Property Act, 1882, her executors no longer take as appointees of a specific fund, but in a full representative capacity, and therefore take the undisposed-of portion in their own right, but hold it, it is submitted, as trustees for the husband, subject to the payment of the wife's debts and liabilities.

To carry out the purposes of the Married Women's Property Act, 1882, "the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities, and be subject to the same jurisdiction, as she would be if she were living" (*i*). In most cases where the wife dies intestate, the husband on taking out letters of administration becomes her legal personal representative. The effect of this section is, that whoever represents the dead wife, so far as

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(*a*) See *Askew* v. *Rooth*, L. R. 17 Eq. 426; 43 L. J. Ch. 368.

(*b*) *Owens* v. *Dickenson*, Cr. & Ph. 48. See also *London Chartered Bank of Australia* v. *Lempriere*, L. R. 4 P. C. 572; 42 L. J. P. C. 49, overruling *Shattock* v. *Shattock*, L. R. 2 Eq. 182; 35 L. J. Ch. 509. For the modern practice of granting letters of limited administration to the husband of his wife's undisposed-of property, see chap. xiii.

(*c*) See Wms. Exors. 529 n., 531, 640, 651.

(*d*) *In the Goods of Moore*, [1891] P. 299; 60 L. J. P. 98.

(*e*) *In the Goods of Turner*, 12 P. D. 18; 56 L. J. P. 41.

(*f*) *Ibid.*

(*g*) *In the Goods of Conolly*, 74 L. T. 461.

(*h*) Lewin, 972.

(*i*) Sect. 23.

her separate property is concerned, has the same right to prosecute claims, and is responsible for the same liabilities as she would have had, and been responsible for, if she had lived, or had been a single woman; but it does not keep alive claims by or against her which, by force of the principle expressed in the maxim *actio personalis moritur cum persona*, abate on her death.

In former editions the fact that only the legal personal representative of the wife was mentioned, and not her heir-at-law or other real representative, was pointed out as a *casus omissus* on the part of the Legislature; but by the Land Transfer Act, 1897 (*k*), one object of which was to establish "a real representative," the representation of the heir-at-law was altogether abolished; and where real estate was vested in any person without a right in any other person to take by survivorship, on his death, notwithstanding any testamentary disposition, it devolved upon and became vested in his personal representatives or representative from time to time, as if it were a chattel real vesting in them or him; and probate and letters of administration might be granted in respect of real estate only, although there was no personal estate (*l*). These provisions did not apply to *copyhold land* or *customary freehold land* in any case in which an admission or any act by the lord of the manor was necessary to perfect the title of a purchaser from the customary tenant. Under this Act the Court might, in its discretion, refuse to grant administration to the husband, and might grant letters to the heir-at-law of the deceased wife (*m*).

If at the time of the wife's death there was any dispute between her and her husband as to what was or was not her separate property, and she left an executor, he could proceed to enforce any claim she might have had against him; and if under such circumstances she died intestate leaving creditors, one of her next-of-kin, or even a creditor, would be constituted the administrator of her estate in preference to her husband, in order that the claims of the creditors might be safeguarded against the marital rights (*n*).

The Administration of Estates Act, 1925 (*o*), carries this

(*k*) 60 & 61 Vict. c. 65. (*l*) Sect. 1, and see sects. 2, 3, and 4.
(*m*) *In the Goods of Ardern*, [1898] P. 147; 67 L. J. P. 70.
(*n*) These claims could be enforced under section 17 by the creditors in the same way as the wife could enforce them, in the event of disputes as to her separate property arising between him and herself. If there was a dispute between the husband and wife, and the latter died leaving the former her executor, any claim that she might have had against him would at once cease and be determined.
(*o*) 15 Geo. V. c. 23, s. 45.

doctrine of representation a step further, as under its provisions all existing Statutes of Distribution are abolished, all customary modes of descent are also abolished, and in the event of intestacy the rights of the surviving spouse, whether husband or wife, are identical (*p*). All freeholds are directed to be converted and to be distributed in the same way as personalty (*q*), and both real and personal estate are assets for the payment of debts (*r*).

Right of Widow to Administer to Husband's Estate.—As to the right of the widow, the statute 21 Hen. VIII. c. 5, s. 3, directed that the Ordinary shall grant administration "to the widow *or* the next-of-kin, *or* to both," at his discretion. The statute further directed the Ordinary, in his discretion, to grant administration to *both* the widow and the next-of-kin; and it has been held that the grant may be to them both jointly, or both separately, by committing several administrations of several parts of the goods of the intestate. But the Court prefers a sole to a joint administration, and never forces a joint one; and in modern practice the choice of the judge is in favour of the widow, under ordinary circumstances. The Court has always held that administration may be granted to the next-of-kin, and the widow be set aside upon good cause; for instance, if she has barred herself of all interest in her husband's personal estate by her marriage settlement, or where she is a lunatic, or where she has eloped from her husband, or cohabited in his lifetime with another man, or has lived separate from her husband (*s*); but justifying security may be required of the administrator to the extent of the widow's share in the property (*t*). A strong case, however, must be made out against her (*u*); and the circumstance of the wife having married again is no valid objection (*x*). However, if the deceased left children, one of whom, supported by the rest, applies for administration, the second marriage *might* induce the Court to prefer the child (*y*).

On the analogy of the case of *Frampton* v. *Stephens* (*z*), in

(*p*) Sect. 46.
(*q*) Sect. 33.
(*r*) Sect. 32.
(*s*) *In the Goods of Anderson*, 33 L. J. P. 149; 3 Sw. & T. 489; *In the Goods of Stevens*, [1898] P. 126; 67 L. J. P. 60.
(*t*) *In the Goods of Stevens* (*ubi sup.*).
(*u*) *In the Goods of Cory*, 84 L. T. 270.
(*x*) *Webb* v. *Needham*, 1 Add. 494.
(*y*) 1 Wms. Exors. 327.
(*z*) 21 Ch. D. 164; 51 L. J. Ch. 502. See *Pettifer* v. *James*, Bunb. 16. But it would be otherwise where she had been judicially separated from him because of his cruelty. *Re the Goods of Ihler*, L. R. 3 P. & D. 50; 42 L. J. P. & M. 18.

which the Court held that a woman divorced for adultery lost her right to dower, she loses her right to administer, or share in the distribution of, her late husband's estate (*a*); so, if she has lived separate up to the time of his death (*b*). But where a mere charge of misconduct is preferred against the widow, she will not be passed over without being cited (*c*); a wife who has had her marriage annulled is disentitled to an annuity which had been bequeathed to her by the testator as "my said wife so long as she shall continue my widow and unmarried" (*d*).

Widow's Share under Statute of Distributions.—Under the Statute of Distributions (*e*), where the husband died intestate, leaving a widow and a child or children, or lineal descendants of such child or children, the widow was entitled to one-third of his personal estate, after satisfying his debts and liabilities (*f*); if there were no child or children, nor any legal representatives of them, then one moiety of the estate was allotted to the wife of the intestate (*g*). A widow as such is not next-of-kin in blood to her husband, so that where, in a settlement of a fund belonging to the husband, the ultimate limitation was for his "next-of-kin in blood according to the Statute of Distribution of the estates of intestates' effects, and in the manner in which the same would have been distributed if he had died possessed thereof intestate," the words "next-of-kin in blood" excluded his widow (*h*).

This right of the widow might have been barred by an antenuptial settlement excluding her from her distributive share, even though she were an infant at the date of its execution (*i*). It might also be affected by her husband's covenant to leave her a portion of his personal estate. The rule in such cases was—where the husband covenanted to leave, or that his executor should pay, to his widow a sum of money or part of his personal estate, and he died intestate, so that she became entitled to her portion under the statute, such distributive share was a performance of the covenant, and she could not claim both, unless

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(*a*) *In the Goods of Nares*, 13 P. D. 35; 57 L. J. P. 19.
(*b*) *Chappell* v. *Chappell*, 3 Curt. 429.
(*c*) *In the Goods of Middleton*, 14 P. D. 23; 58 L. J. P. 28.
(*d*) *Re Boddington, Boddington* v. *Clairat*, 25 Ch. D. 685; 53 L. J. Ch. 475.
(*e*) 22 & 23 Car. II. c. 10.
(*f*) Sect. 5.
(*g*) Sect. 6. The other moiety goes to the next-of-kin, or to the Crown, if there be no next-of-kin.
(*h*) *Re Fitzgerald's Trusts*, 58 L. J. Ch. 662; 37 W. R. 552.
(*i*) *Earl of Buckinghamshire* v. *Drury*, 2 Ed. 60.

the distributive share were less than the covenanted; in which case the former was a satisfaction *pro tanto* of the latter (*k*). But where the husband's covenant was entire, and the provision therein expressed to be secured to the wife was such that the covenant in part might be held to be performed by the widow's distributive share under her husband's intestacy (according to the authorities cited in the footnote below), and the remaining part could not be so considered, then, since the covenant was entire, the Court would not split it, and hold a performance and a non-performance at the same time (*l*).

Intestates' Estates Act, 1890.—In the case of small estates a complete alteration was made in this branch of the law by the Intestates' Estates Act, 1890 (*m*); and where a man died intestate after September 1, 1890, and before January 1, 1926, leaving a widow but no issue, and his estate did not exceed £500 in value, instead of the widow being entitled to her one-third of the realty in the shape of dower, or her half of the personalty (or both), she became entitled to the whole (*n*). Where the net value of the estates exceeded £500, the widow was entitled to £500 absolutely and exclusively, and had a charge upon the whole of such real and personal estate for the £500 (*o*); and as between the real and personal representatives of the intestate such charge was borne and paid in proportion to the values of the real and personal estates respectively (*p*). This provision for the widow was in addition and without prejudice to her interest and share in the residue of the real and personal estates of the intestate remaining after the payment of the said sum of £500 in the same way as if the residue had been the whole of the intestate's real and personal estates and the Act had not been passed (*q*). This Act only applied where there had been a total intestacy (*r*).

(*k*) 2 Rop. H. & W. 44; 2 Wms. Exors. 1236; *Blandy* v. *Widmore*, 1 P. Wms. 324; *Lee* v. *D'Aranda*, 1 Ves. Sen. 1; *Garthshore* v. *Chalie*, 10 Ves. 1.

(*l*) 2 Rop. H. & W. 52; *Pouch* v. *Stratton*, 4 Ves. 391; *Lang* v. *Lang*, 8 Sim. 451. See also *Young* v *Young*, I. R. 5 Eq. 615.

(*m*) 53 & 54 Vict. c. 29.

(*n*) Sect. 1.

(*o*) Sect. 2.

(*p*) Sect. 3. Section 5 provides for ascertaining the net value of the realty; and section 6 for ascertaining the net value of the personalty.

(*q*) Sect. 4.

(*r*) *Re Twigg's Estate, Twigg* v. *Black*, [1892] 1 Ch. 579; 61 L. J. Ch. 444. In this case, Chitty, J., said the expression "testamentary expenses of the intestate in section 6 is equivalent to expenses of letters of administration and of administration generally, and do not refer to the expenses of one who has died partially testate."

SECTION 4.

Real and Personal Property.

The Administration of Estates Act, 1925 (*s*), repeals the Statute of Distributions (22 & 23 Car. II. c. 10), the Executors Act, 1830, the Administration of Estates Acts of 1833 and 1869, and the Intestates' Estates Act, 1884 and 1890. In regard to the right of succession to each other's property on intestacy, the rights of the surviving spouse, whether husband or wife, as we have seen, are exactly alike (*t*). In regard to the right to administer, the Act provides in section 10 that in granting administration the Court shall have regard to the rights of all persons interested in the real and personal estate, and in particular administration with the will annexed may be granted to a devisee or legatee; in regard to land settled previously to the death and not by will administration may be granted to the trustees of the settlement, and in case of complete intestacy (unless by reason of insolvency the Court appoints some other person) to some one or more of the persons interested under the new law of distribution laid down by the Act. Special provisions may be made as to dispensing with sureties where the grant is made to a trust corporation or to two or more individuals (*u*). Representation is not to be granted to more than four persons, and where any beneficiary is an infant, or a life interest arises under the will or intestacy, representation may be granted either to a trust corporation with or without an individual, or to not less than two individuals. Where an infant beneficiary exists, or a life interest arises, and there is only one personal representative, the Court may appoint one or more personal representatives in addition to the original representative. These provisions apply to grants made after the commencement of the Act (January 1, 1926), whether the death of the testator or intestate occurred before or after that date (*x*). Grants may be in respect of real estate together with personal estate, or in respect of real estate only where there is no personal estate, or in respect of a trust estate only (*y*). Where a trust corporation is appointed executor the Court may grant probate or may grant administration to a trust corporation, who may act

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(*s*) 15 Geo V. c. 23.
(*t*) *Ante*, p. 202.
(*u*) Sect. 11.
(*x*) Sect. 12.
(*y*) Sect. 13.

as administrator either alone or jointly with another person, and the corporation may act as executor or administrator accordingly (*z*). Every administrator shall have the same rights and liabilities and be accountable in like manner as if he were an executor (*a*).

(*z*) Sect. 14.

(*a*) Sect. 21.

CHAPTER X.

THE GENERAL EFFECT OF COVERTURE.

Marriage not only modifies the status of those who enter upon it, but also affects certain acts and deeds done by the husband or wife anterior to it, and, further, puts the spouses under certain disabilities both with respect to one another and third persons.

Ante-nuptial Acts and Agreements of Husband and Wife.—Marriage operates to extinguish or revoke several acts of the wife done when a *feme sole*. Thus, a will made by a single woman was revoked on her marriage (*a*), and the consent of the husband did not make it the less invalid (*b*); and though the wife survived the husband, such a will did not until quite recently revive after the husband's death without republication (*c*). A warrant of attorney executed by her *dum sola* was revoked by her marriage (*d*). Her submission to arbitration was also revoked, if the marriage took place before the award (*e*). This, however, is no longer law, as by the effect of the Married Women's Property Act, 1882 (*f*), a woman after her marriage continues to be liable to the extent of her separate property in respect of all contracts entered into by her before her marriage.

Before the Wills Act, 1837 (1 Vict. c. 26), the marriage of a man did not revoke his will, and it was not until the birth of a child unprovided for that his will, whether of real or personal property, was revoked, and the revocation was by operation of law and not dependent on any question of intention on the part of the testator (*g*). But by section 18 of that Act, it was provided that

"Every will made by a man or woman after January 1, 1838, shall be revoked by his or her marriage (except a will made in exercise of a power

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(*a*) 1 Vict. c. 26, s. 18.

(*b*) *Doe* dem. *Hodsden* v. *Staple*, 2 T. R. 684.

(*c*) *Lewis's Case*, 4 Burn's Eccl. Law. 51; *Long* v. *Aldred*, 3 Add. 48. See 56 & 57 Vict. c. 63. "If a *feme sole* makes her will and afterwards marries, such subsequent marriage is a revocation and entirely vacates the will, and although she should survive the husband, a will made before marriage will not revive upon his death without republication." 1 Wms. Exors. 42.

(*d*) *Anon.* Salk. 117.

(*e*) *Charnley* v. *Winstanley*, 5 East, 266.

(*f*) 45 & 46 Vict. c. 75.

(*g*) *Marston* v. *Roe*, dem. *Fox*, 8 Ad. & El. 14.

of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions)."

But now by the Law of Property Act, 1925, s. 177, it is provided that a will expressed to be made in contemplation of a marriage, and made after December 31, 1925, shall, notwithstanding anything in section 18 of the Wills Act, 1837, or any other provision or rule of law to the contrary, not be revoked by the solemnization of marriage contemplated. Subject to this provision marriage operates as a revocation of a will, whether affecting real or personal property (*h*). The provisions of the Wills Act, while not applying to the wills of foreigners domiciled abroad but marrying in England (*i*), do apply to their wills if domiciled in England at the time of their marriage (*j*). The rule of law embodied in this section is part of the English matrimonial law and is not testamentary law (*k*). The rule has had legislative sanction accorded to it in matters of a quasi-testamentary character; for the marriage of a member of a registered friendly society (other than a benevolent or working man's club) operates as a revocation of any previous nomination by him or her of the person to whom any sum of money payable by the society on the death of the member shall be paid (*l*). The payment, however, by the society in ignorance of the subsequent marriage shall be a discharge to the society (*m*).

Effect of Marriage on Ante-nuptial Agreements.—Marriage, as a general rule, by the common law extinguished all prior obligations and contracts between husband and wife (*n*), unless made on the occasion and in consideration of the marriage, or where the obligation was of a continuing nature, as a covenant by the husband to pay his wife an annuity during her life; in which case it was suspended and not extinguished during coverture, and might be enforced by the wife for arrears accrued after the death of her husband (*o*). So, again, if the contract

(*h*) See *In the Estate of Wardrop*, [1917] P. 54; 86 L. J. P. 37.
(*i*) Per Lindley, M.R., in *Re Martin, Loustalan* v. *Loustalan*, [1900] P. 211; 69 L. J. P. 75.
(*j*) *Re Martin, Loustalan* v. *Loustalan*, (*ubi sup.*).
(*k*) Per Vaughan Williams, L.J., *ibid.* 240.
(*l*) 59 & 60 Vict. c. 25, s. 56 (1).
(*m*) Sect. 60 (1).
(*n*) Co. Litt. 294 *b*; *Smith* (*et uxor*) v. *Stafford*, Hobart, 216.
(*o*) *Clark* v. *Thompson*, Cro. Jac. 571; *Cage* v. *Acton*, 1 Ld. Raym. 522; *Fitzgerald* v. *Fitzgerald*, L. R. 2 P. C. 63; 37 L. J. P. C. 44. In *Pridgeon* v. *Pridgeon*, 1 Ch. Cas. 117, it was held that where an agreement is between *baron* and *feme* before marriage that the wife may dispose of part of her estate, or for

has been entered into by the husband with his wife (*dum sola*) in her representative capacity as executrix, &c., it was only suspended during coverture (*p*). Where a woman as such executrix, or administratrix, married one who was a debtor to the estate, the debt was not released (*q*). A bond entered into by a woman with her intended husband was not void in equity (*r*), and is now good both at law and in equity. There does not seem to be any doubt that since the passing of the Married Women's Property Act, 1882 (*s*), conferring on a married woman full powers of contracting with her husband, and preserving her property to her, ante-nuptial bonds and agreements (other than marriage settlements) between a man and woman who afterwards intermarry will not be affected by the mere marriage.

Post-nuptial Transactions between Husband and Wife.—The effect of marriage is to bring not only the wife but also the husband under certain disabilities and incapacities in reference to each other during the existence of the coverture. Many of these disabilities and incapacities which once flourished at common law have, by the operation of equitable principles or by direct legislative sanction, quite disappeared; those which flowed from the theory of the merged or suspended separate existence of the wife, rendering the married couple incapable of treating each other as separate persons in relation to their contracts and property, have been altogether abrogated by positive enactments. Accordingly, it will be found that most of the incapacities of the spouses, though still incapacities by the common law, are such but in name. There are, however, a few incapacities to which attention will now be drawn.

Incapacity at Common Law to Give Evidence for or against Each Other in Criminal Matters.—It may be laid down as a general proposition that at common law husband and wife are mutually incompetent to give evidence either for or against each other in criminal matters (*t*); but if one spouse makes a statement in the presence of the other spouse who is charged with an offence, and the latter either authorizes the statement or

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a thing which is future to the marriage, such an agreement is not dissolved by the marriage; yet where an agreement is to have execution during the coverture, there the marriage extinguisheth the agreement.

(*p*) Co. Litt. 351 *b*; *Richards* v. *Richards*, 2 B. & Ad. 452.

(*q*) *Dorchester* v. *Webb*, Cro. Car. 372.

(*r*) *Cannel* v. *Buckle*, 2 P. Wms. 243.

(*s*) 45 & 46 Vict. c. 75.

(*t*) Gilb. Evid. 119; 2 Hawk. P. C. c. 46, s. 70; Bull. N. P. 286; 16 & 17 Vict. c. 83, s. 2.

does not contradict it, evidence of such statement may be given (*u*). Even in collateral matters neither is bound to answer questions which would tend directly to criminate the other (*x*); but the proof of the one is not to be excluded in such cases, because it may afford the means of procuring evidence against the other (*y*). The exceptions to this rule are for the protection of husband or wife; where the charge is one of personal violence of husband against wife or of wife against husband, the husband or wife can give evidence against the other. Some are also for the advantage of the public (*z*); thus, the dying declarations of the one are admissible against the other on a charge of murder (*a*). In an abduction case likewise, where the wife has been forcibly married, her evidence has been admitted (*b*). The wife of a person charged under the Vagrancy Act, 1898 (*c*), may be called as a witness either for the prosecution or defence, and without the consent of the person charged. The same rule applies to the wife or husband of a person charged under the Children (Employment Abroad) Act, 1913 (*d*), or under the Mental Deficiency Act, 1913 (*e*). There has been another special exception created by the Married Women's Property Act, 1882 (*f*), and the Married Women's Property Act (Amendment) Act, 1884 (*g*), which enables husband or wife to give evidence against each other, on the prosecution of the one by the other for larceny of his or her property committed on desertion (*h*). The Larceny Act, 1916, gives husband and wife redress as to the property of each unless they are living together (*hh*). In recent statutes creating new offences there is usually a clause enabling the husband or wife of the accused to be called as a witness for the prosecution or the defence; thus, in a prosecution

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(*u*) *Reg.* v. *Mallory*, 13 Q. B. D. 33.

(*x*) *Reg.* v. *Gleed*, cited 3 Russ. Crim. 623.

(*y*) *Rex* v. *All Saints, Worcester*, 6 M. & S. 194.

(*z*) *Lord Audley's Case*, 3 St. Tr. 401; *Reg.* v. *Jellyman*, 8 C. & P. 604.

(*a*) *Woodcock's Case*, 1 Leach, 500.

(*b*) 1 East, P. C. c. 11, s. 5, p. 454; *Rex* v. *Wakefield*, cited 3 Russ. Cr. 625.

(*c*) 61 & 62 Vict. c. 39. Criminal Law Amendment Act, 1912 (2 & 3 Geo. V. c. 20), s. 7 (6), overruling *Director of Public Prosecutions* v. *Blady*, [1912] 2 K. B. 89; 81 L. J. K. B. 613.

(*d*) 3 & 4 Geo. V. c. 7.

(*e*) 3 & 4 Geo. V. c. 28.

(*f*) 45 & 46 Vict. c. 75, ss. 12, 16.

(*g*) 47 & 48 Vict. c. 14, s. 1. It was found necessary to pass this Act to enable husbands to give evidence against their wives in a prosecution for stealing their property when leaving or deserting them, in consequence of the decision of the Court for Crown Cases Reserved in *Reg.* v. *Brittleton*, 12 Q. B. D. 266; 53 L. J. M. C. 83.

(*h*) By section 3 of 16 & 17 Vict. c. 83, mutual communications of husband and wife were privileged; but it is now doubtful whether such communications which would have direct bearing upon what may be called "statutory matrimonial larceny" will be so privileged.

(*hh*) 6 & 7 Geo. V. c. 50, s. 36.

under section 156 of the Army Act, 1881 (*i*), and section 4 of the Explosive Substances Act, 1883 (*k*), the wife or husband of the accused may, if she or he thinks fit, be called as an ordinary witness in the case; so, under the Criminal Law Amendment Act, 1885 (*l*), the husband or wife of the person charged shall be a competent but not compellable witness except before a grand jury; and a husband or wife of a person charged under the Libel Act, 1888 (*m*), the Prevention of Cruelty to Children Act, 1904 (*n*), and the Betting Loans (Infants) Act, 1892 (*o*), is a competent but not compellable witness. On trials of indictments or other proceedings instituted for the purpose of trying or enforcing a civil right only the wife or husband of any defendant is not only an admissible but a compellable witness (*p*). Under the Sale of Food and Drugs Act, 1875 (*q*), the wife is a competent witness on behalf of her husband; and if she were to carry on a trade separately from her husband and were charged with an offence under this last Act, her husband would now be a competent witness in her favour.

The strong tendency of recent years to treat husband and wife as competent witnesses affecting each other in criminal cases has been developed in the Criminal Evidence Act, 1898 (*r*), under the provisions of which the husband or wife of every person charged with an offence becomes a competent witness for the defence at every stage of the proceedings (*s*). But where a person is charged with an offence under the Acts mentioned in the schedule to the Act (*t*), then under the fourth section the wife or husband of the person charged may be called as a witness for the prosecution or defence, and without the consent of the person charged. This section now applies to proceedings under the Incest Act, 1908 (*u*), and the Children Act, 1908 (*x*). If husband or wife be called, he or she is not compellable to disclose any communications made to each other during marriage (*y*).

(*i*) 44 & 45 Vict. c. 58.
(*k*) 46 & 47 Vict. c. 3.
(*l*) 48 & 49 Vict. c. 69, s. 20.
(*m*) 51 & 52 Vict. c. 64.
(*n*) 4 Edw. VII. c. 15, s. 12.
(*o*) 55 Vict. c. 4, s. 6.
(*p*) 40 Vict. c. 14, s. 1.
(*q*) 38 & 39 Vict. c. 63, s. 21.
(*r*) 61 & 62 Vict. c. 36.
(*s*) Sect. 1.
(*t*) The Vagrancy Act, 1824 (5 Geo. IV. c. 83); Offences against the Person Act, 1861 (24 & 25 Vict. c. 100, ss. 48—55, which deal with the ravishment, abduction and defilement of women); The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75, ss. 12, 16); The Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69); Dangerous Performances Acts, 1879 and 1897 (42 & 43 Vict. c. 34; 60 & 61 Vict. c. 52); and the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41).
(*u*) 8 Edw. VII. c. 46, s. 4 (4).
(*x*) 8 Edw. VII. c. 67, s. 27.
(*y*) Sect. 1 (d).

The absence of husband or wife from the witness box is not to be commented on by the prosecution (*z*).

Where a wife is called as a witness against her husband, it is advisable for the Court to warn her that she is not compelled to give evidence, but there is no obligation on the Court to give such warning (*a*).

In Civil Matters.—In civil matters husband and wife are now under no disability as to giving evidence for or against each other in suits in which one or other or both may be parties. The Evidence Amendment Act (*b*) rendered husbands and wives of parties admissible witnesses for or against each other in civil suits (*c*), but provided that "no husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage" (*d*). There was a provision as to their mutual incompetence in "any proceeding instituted in consequence of adultery"; but this was repealed by the third section of the Evidence Amendment Act, 1869 (*e*), which enacted that: "The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding, provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery" (*f*); but this section does not permit discovery to be required from a party to divorce proceedings, when it is sought for no other purpose than to prove such party guilty of adultery (*g*). This proviso does not render inadmissible the evidence of a witness that he or she has committed adultery, but the witness may claim the protection of the statute (*h*).

Before the passing of the Act 16 & 17 Vict. c. 83, providing

(*z*) Sect. 1 (b).
(*a*) *Rex* v. *Ancaster* (1912), 106 L. T. 384, C. C. A.; *Leach* v. *Rex*, [1912] A. C. 305; 81 L. J. K. B. 616.
(*b*) 16 & 17 Vict. c. 83.
(*c*) Sect. 1.
(*d*) Sect. 3.
(*e*) 32 & 33 Vict. c. 68.
(*f*) Sect. 3.
(*g*) *Redfern* v. *Redfern*, [1891] P. 139; 60 L. J. P. 9.
(*h*) *Hebblethwaite* v. *Hebblethwaite*, L. R. 2 P. & D. 29; 39 L. J. P. M. & A. 15.

for the privilege of communications made between husband and wife during marriage, the judges had construed the common law rule which excluded the evidence of husband and wife as affecting widowers and widows so that they were not compelled to disclose communications made to them by their dead spouses (*i*), and also those who had been divorced were included (*k*). Where a husband has permitted his wife to act for him in any department of business, her admissions or acknowledgments in respect of such business are admissible to charge him; but she cannot bind him by admissions, unless they fall within the scope of the authority which she may reasonably be presumed to have derived from him (*l*).

Incapacity to Steal from One Another.—By the common law a husband and wife cannot steal from one another, not only because of the supposed unity of their persons, but also because of the terrible scandal which would be provoked by the sight of the husband or wife having recourse to the criminal law to settle their mere property disputes (*m*); and the adultery of the wife does not give her husband the right to prefer a charge of larceny against her (*n*). But the Legislature, in 1882, (*o*), altered the common law on the matter by enacting that a wife may have redress against her husband, and a husband against his wife, by way of criminal proceedings (as though they were strangers to each other), for the protection and security of each other's property,

"provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife."

This proviso applies under section 16, *mutatis mutandis*, to the similar right of the husband to institute criminal proceedings against his wife. It seems probable that it will be difficult under these sections to secure convictions, except in those cases where the husband or the wife has actually left the other,

(*i*) *O'Connor* v. *Marjoribanks*, 4 M. & G. 435.
(*k*) *Munroe* v. *Twistleton*, Peake, Add. Cas. 221; *Aveson* v. *Lord Kinnaird*, 6 East, 192.
(*l*) *Meredith* v. *Footner*, 12 L. J. Ex. 183; 11 M. & W. 202.
(*m*) Hale P. C. 514; 3 Co. Inst. 110.
(*n*) *Reg.* v. *Kenny*, 2 Q. B. D. 307; 46 L. J. M. C. 156.
(*o*) 45 & 46 Vict. c. 75, ss. 12, 16.

feloniously taking away property belonging to the other, or after the leaving or desertion is complete the deserting spouse returns and unlawfully takes away the goods of the other. As they cannot prosecute each other for acts done during cohabitation, it is difficult to see how an act done when "about to leave or desert," that is, before cohabitation is suspended or interrupted, can be the subject of criminal proceedings (*p*). Runaway wives and their avouterers are more likely under the present law than under the past to be cautious in ascertaining whether the property taken with them in their flight does or does not belong to the deserted husbands. But the avouterers are not liable to be indicted for feloniously receiving the stolen property, as such theft by deserting wives was not a felony at common law or under the Larceny Act, 1861, but was made a special crime by the Married Women's Property Act, 1882 (*q*). The Larceny Act, 1916, however, gives a wife the same redress as though she were a *feme sole*, and both are equally liable to criminal proceedings under the Act and the offence is a felony (*r*). In an indictment it is not necessary to aver that the accused was the spouse of the person prosecuting or had taken the goods when leaving or deserting or about to leave or desert the other spouse (*s*).

Incapacity to Sue Each Other for Torts.—By the common law neither husband nor wife can sue each other for personal torts committed by one against the other—such as libel, slander, assault and battery, or injury arising out of negligence (*t*); and this was so not only on the ground of the merged existence of the wife, and their incapacity to acquire civil rights against each other (*u*), but also on account of the unseemly spectacle presented by husband and wife seeking pecuniary compensation from each other for personal wrongs. This disability to sue each other for personal torts still exists; and neither spouse can take

(*p*) But see *Rex* v. *King* (1914), W. N. 63; 110 L. T. 783, C. C. A. ("about to leave or desert his wife" held to be a question of fact in each case). See also Larceny Act, 1916 (6 & 7 Geo. V. c. 50, s. 36), and *Rex* v. *Bloom* (1910), 74 J. P. 183, C. C. A.

(*q*) *Reg.* v. *Streeter*, [1900] 2 Q. B. 601; 69 L. J. Q. B. 915.

(*r*) 6 & 7 Geo. V. c. 50, s. 36.

(*s*) *Rex* v. *James and Johnson*, [1902] 1 K. B. 540; 71 L. J. K. B. 211.

(*t*) In *Webster* v. *Webster*, [1916] 1 K. B. 714; 85 L. J. K. B. 691, an action to restrain a wife from pledging her husband's credit was held to be in tort; but in *Hill* v. *Hill* (1916), W. N. 59, a wife was restrained at the instance of her husband from preventing persons from viewing his house which was for sale; and in *Hulton* v. *Hulton*, [1917] 1 K. B. 813; 86 L. J. K. B. 633, it was held that a wife could not sue for deceit in inducing her to enter into a deed of separation, but could apply for rescission.

(*u*) *Phillips* v. *Barnett*, 1 Q. B. D. 440; 45 L. J. Q. B. 277.

criminal proceedings against the other for defamatory libel (*x*). But by the twelfth section of the Married Women's Property Act, 1882, a married woman is rendered capable of suing her husband for a tort committed by him in respect of her separate property, whether she brings her action during the continuance of the coverture, or after its dissolution by divorce, or suspension by judicial separation. Under this section she may bring an action of detinue of her personal property against her husband; and section 17 of this Act, which provides a summary remedy for the settling of disputes as to the title to or possession of property between husband and wife, is not a bar to the bringing of such action (*y*). In the case of *Re Wingfield and Blew* (*Solicitors*) (*z*), the costs of solicitors who acted for a wife in an action of detinue brought by her against her husband were held properly recoverable by them against him.

Wills of Married Women.—A married woman was, generally speaking, at common law incapable of making a will affecting the legal estate in her freehold or copyhold lands, or disposing of her personal property. As regards her realty, she was disqualified, because excepted out of the testamentary powers conferred by the Statute of Wills (*a*), which enactment provided that "the will or testament of a married woman made of any manor, lands, tenements, or other hereditaments, by any woman covert, should not be good or effectual in law." The Wills Act of 1837 (*b*) did not give her any powers which she did not before possess. Formerly, her will, if she survived her husband, did not revive unless republished (*c*); but under the Married Women's Property Act, 1893 (*d*), her will, if made during coverture, will not require to be re-executed or republished after the death of her husband, and will speak as from her death. This alteration of the law affects the will of every married woman dying after the Act came into operation (*e*).

(*x*) *Reg.* v. *Lord Mayor of London*, 16 Q. B. D. 772; 55 L. J. Q. B. 118.

(*y*) *Larner* v. *Larner*, [1905] 2 K. B. 539; 74 L. J. K. B. 797. Section 17 seems limited to questions of title to or possession of property, and probably property of the nature of stocks, funds and shares in public bodies, and was not intended to prevent a married woman from suing her husband in tort and for damages, who had wrongfully injured or detained her personal property. *Re Married Women's Property Act*, 1882, [1917] 2 K. B. 179, sub nom. *Re Humphery and Humphery*, 86 L. J. K. B. 775, as to judge's duty to decide and not to refer question.

(*z*) [1904] 2 Ch. 665; 73 L. J. Ch. 797.

(*a*) 34 & 35 Hen. VIII. c. 5. (*b*) See 1 Vict. c. 26, s. 18.

(*c*) 1 Wms. Exors. 39.

(*d*) 56 & 57 Vict. c. 63, s. 3. This section renders section 24 of the Wills Act, 1837, applicable to the will of a married woman made during coverture.

(*e*) *Re Wylie*, *Wylie* v. *Moffat*, [1895] 2 Ch. 216; 64 L. J. Ch. 613.

But under certain circumstances she was enabled at common law to make an effectual testament of her personal property, notwithstanding the fact of the coverture. She could make a valid will where she bargained with her husband for the exercise of the right (*f*), or obtained his assent to a particular will, and he survived her and assented to its being proved (*g*). It was not enough to show a general assent, but that he had consented to the particular will made by her (*h*); he could therefore revoke his consent at any time during his wife's life or after her death; though in the latter case, if he acted upon, or agreed to her will, he was not at liberty to retract his assent and oppose probate (*i*). This bargaining on the part of the wife and the consent of the husband were necessary; for as marriage operated as a conveyance of the wife's personal property to the husband, she had nothing upon which to exercise her disposing power, and the husband's assent amounted to a waiver of his rights as his wife's administrator (*k*).

She was permitted with her husband's consent to make a will of property coming to her *en autre droit*, as executrix, because of the absence of any beneficial interest on his part in such property (*l*). The effect of her will was to pass by a pure right of representation to the testator or prior owner such of his personal assets as remained outstanding, but no beneficial interest in them which the wife might have had in them (*m*). She might also have made a will in cases where her husband was *civiliter mortuus*, as where he was banished or undergoing a sentence of transportation or penal servitude (*n*).

She might make a will of her real or personal property where she acted under a power of appointment by will (*o*); and her will was a good execution of the power, if the power subsisted at the time of her death, though the will was executed before she acquired the power (*p*). If she made a will during coverture in virtue of powers vested, it was not revoked by her surviving her husband (*q*).

(*f*) 1 Rop. H. & W. 170.
(*g*) *Willock* v. *Noble*, L. R. 7 H. L. 580; 44 L. J. Ch. 345.
(*h*) *Henley* v. *Phillips*, 2 Atk. 49.
(*i*) 2 Br. H. & W. 65; see *In the Goods of S. A. Cooper*, 6 P. D. 31; 50 L. J. P. D. & A. 41; *Elliot* v. *North*, [1901] 1 Ch. 424; 70 L. J. Ch. 217.
(*k*) 2 Br. H. & W. 66 *et seq.*
(*l*) *Scammell* v. *Wilkinson*, 2 East, 552; *S. C. Stevens* v. *Bagwell*, 15 Ves. 139.
(*m*) 2 Br. H. & W. 64. (*n*) *Ibid.* 39.
(*o*) Sugd. Pow. 153.
(*p*) *Thomas* v. *Jones*, 32 L. J. Ch. 139.
(*q*) See *Willock* v. *Noble*, L. R. 7 H. L. 580; 44 L. J. Ch. 345.

In equity, however, the right of disposition by will of her separate personal estate (*corpus* and savings) has been long conceded to a *feme covert* as being a necessary incident to the enjoyment of her separate property (*r*). She could also dispose of her equitable interests in realty, for both the Wills Acts of Henry VIII. (*s*) and of 1837 (*t*) were deemed in equity to apply only to lands of a married woman of which her husband stood seised *jure uxoris*, but not to lands settled to her separate use; and she could dispose of the whole of her interest in them (*u*). For fuller details as to the testamentary powers of married women in equity and under the Act of 1882, see the chapter on Separate Estate (*x*).

Joint Will of the Spouses.—Husband and wife can make a joint will, and if not revoked by either party on the death of one, the Court will grant próbate of so much of it as becomes operative through the death (*y*).

Commorientes.—Formerly, where husband and wife perished through one and the same catastrophe, as by shipwreck, and there was no evidence as to who was the survivor, there was no presumption in law of survivorship in favour of either spouse (*z*), and letters of administration in respect of the property of each were granted to the next-of-kin of each (*a*); but now the Law of Property Act, 1925 (*b*), provides that in all cases where after December 31, 1925, two or more persons die in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the Court) for all purposes affecting the title to property be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder.

(*r*) *Fettiplace* v. *Gorges*, 1 Ves. 46; 3 Bro. C. C. 8; *Sturgis* v. *Corp*, 13 Ves. 190; *Taylor* v. *Meads*, 34 L. J. Ch. 203.

(*s*) 34 & 35 Hen. VIII. c. 5.

(*t*) 1 Vict. c. 26.

(*u*) *Taylor* v. *Meads* (*ubi sup.*).

(*x*) *Post*, chap. xiii.

(*y*) *In the Goods of Piazzi Smyth*, [1898] P. 7; 67 L. J. P. 4.

(*z*) *Wing* v. *Angrave*, 8 H. L. Cas. 183; 30 L. J. Ch. 65; *In the Goods of Alston*, [1892] P. 142; 61 L. J. Ch. 92.

(*a*) *In the Goods of Benyon*, [1901] P. 141; *In the Estates of Bruce* (*M.*) *and Bruce* (*G. M.*), 26 T. L. R. 381.

(*b*) 15 Geo. V. c. 20, s. 184.

CHAPTER XI.

OBLIGATIONS ARISING OUT OF COVERTURE.

The chapter will be divided into three sections:—

Section 1.—(*a*) Obligation of Husband to Support Wife and Family.
(*b*) Obligation of Wife to support Husband and Family.

Section 2.—(*a*) Liability of Husband for Wife's Ante-nuptial Debts and Contracts.
(*b*) Liability of Wife for Ante-nuptial Debts and Contracts.

Section 3.—(*a*) Liability of Husband for Wife's Ante-nuptial and Post-nuptial Torts.
(*b*) Liability of Wife for Ante-nuptial and Post-nuptial Torts
(*c*) Liability of Husband for Wife's Ante-nuptial and Post-nuptial Breaches of Trust and Devastavits.

Section 1.

(a) Obligation of Husband to Support Wife and Family.

The husband, as head of the household, is under an obligation to support and maintain his wife and family, in which latter term are included the children of his wife by a former marriage (*a*). This obligation was, until quite recently, rather moral than legal. It was not until his wife became actually chargeable to a parish or union that he was liable to be punished for refusing or neglecting to support her, and then only as a rogue and vagabond (*b*). The wife, in truth, had no claim on her husband, even when starving and deserted by him; the guardians or overseers of the union or parish, the charges of

(*a*) *Hill* v. *Hill*, [1902] P. 140; 71 L. J. P. 81.
(*b*) Under 5 Geo. IV. c. 83, ss. 3 and 4; *Heath* v. *Heape*, 26 L. J M. C. 49; 1 H. & N. 478.

which have been increased by his wrongdoing, alone could bring the offender to justice under the Poor Law Amendment Act, 1868, and recover the price of her maintenance from him (*c*), and the justices in making their order are not limited by the amount already allowed by the guardians, or obliged to wait till they have fixed the sum (*d*). The Poor Law Amendment Act, 1850 (*e*), and the Divided Parishes and Poor Law Amendment Act, 1876 (*f*), deal with the husband's liability to support his wife when in a lunatic asylum. His liability is not restricted by a separation deed or other arrangement (*g*). A husband is not liable to be proceeded against under the Poor Law Amendment Act, 1868 (*h*), or under the Vagrancy Act, 1824 (*i*), so as to be compelled to maintain his wife who has left him and lives in adultery, or as a prostitute (*k*). But where a wife is justified in leaving her husband owing to his treatment, and is afterwards requested by him to return to cohabitation, but is justified in refusing to return to it, an order may be made on him by justices under this Act to contribute to her support (*l*), but not if she without justification refuses to return (*m*). Where a wife leaves her husband without justification his obligation to support her is only suspended unless she commits adultery, and if she becomes a lunatic and chargeable her absence ceases to be wilful and the husband's liability revives (*n*). Where the relatives of a married woman obtained her discharge from a lunatic asylum, giving an undertaking that she should no longer be chargeable to the union, and the husband declined to maintain her on the ground that he was relieved from responsibility, it was held that this belief being erroneous was immaterial, and that the justices ought to have convicted him (*o*). Where a woman, having left her husband,

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(*c*) 31 & 32 Vict. c. 122, s. 33.

(*d*) *Dinning* v. *The South Shields Union*, 13 Q. B. D. 25; 53 L. J. M. C. 90.

(*e*) 13 & 14 Vict. c. 101, s. 5.

(*f*) 39 & 40 Vict. c. 61, s. 20.

(*g*) *Llewellyn* v. *Turner*, 126 L. T. 532.

(*h*) 31 & 32 Vict. c. 122, s. 33.

(*i*) 5 Geo. IV. c. 83, s. 3; *Rex* v. *Flintan*, 1 B. & Ad. 227. Under the Act of 1824, a *bona fide* belief on the part of the husband that his wife has committed adultery is a defence. *Morris* v. *Edmunds*, 77 L. T. 56; but see *Biggs* v. *Burridge*, *infra*.

(*k*) *Culley* v. *Charman*, 7 Q. B. D. 89; 50 L. J. M. C. 111; see *Sibbett* v. *Ainsley*, 3 L. T. 583; *Mitchell* v. *Torrington Union*, 76 L. T. 724; *Wickens* v. *Wickens* (*No.* 2), [1918] P. 282, C. A.; 87 L. J. P. 169.

(*l*) *Thomas* v. *Alsop*, L. R. 5 Q. B. 151; 39 L. J. M. C. 43.

(*m*) *Reg.* v. *Fordham*, 5 T. L. R. 27; *Richards* v. *Coleman*, 88 L. J. K. B. 813.

(*n*) *Jones* v. *Guardians of Newtown and Llanidloes*, [1920] 3 K. B. 381; 89 L. J. K. B. 1161.

(*o*) *Roberts* v. *Regnart*, 126 L. T. 667.

applied to be taken back and failed in two applications for separation, failing to prove desertion, and the husband *bona fide* believed that he was not bound to maintain her, he was held liable (*p*).

Where Divorced or Separated.—A husband is liable for the necessary support of his wife though judicially separated from him, if he has been ordered by the Court to pay alimony to her and does not pay it (*q*). But where the marriage is dissolved he is not liable in any sense for her maintenance or support (*r*); unless an order has been made on him to secure to his divorced wife a certain sum of money whether gross or annual (*s*), or monthly or weekly (*t*). If the husband does not keep up the payment of the alimony, the wife cannot prove in his bankruptcy for the arrears (*u*). This liability to support the wife even after divorce may be enforced against the husband by injunction restraining him from dealing with his property where an order has been made against him under section 32 of 20 and 21 Vict. c. 85 securing to her a sum for her maintenance (*x*); but such injunction will not be granted where in a suit by the wife for judicial separation an order for alimony *pendente lite* has been made against the husband (*y*).

Liability of Soldiers.—There is a difference between the liability of a civilian and that of a soldier in respect of the maintenance of his wife, for though a soldier is liable to contribute to her maintenance as though he were a civilian, yet execution in respect of any order or decree for such maintenance is not to issue against his person, pay, arms, ammunition, equipment, instruments, regimental necessaries or clothing; nor is he liable to be punished for deserting his wife or leaving her chargeable (*z*). When an order or decree for maintenance has been made on a soldier, it is to be sent to a Secretary of State, who may order a certain portion of his pay according to his

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(*p*) *Biggs* v. *Burridge*, 22 L. G. R. 555, distinguishing *Morris* v. *Edmunds*, *supra*.

(*q*) 20 & 21 Vict. c. 85, s. 26. *Shaftesbury Union* v. *Brockway*, [1913] 1 K. B. 159; 82 L. J. K. B. 222.

(*r*) See *Watkins* v. *Watkins*, [1896] P. 225; 65 L. J. P. 75.

(*s*) 20 & 21 Vict. c. 85, s. 32.

(*t*) 29 & 30 Vict. c. 32, s. 1.

(*u*) *Re Hawkins*, *Ex parte Hawkins*, [1894] 1 Q. B. 25.

(*x*) *Newton* v. *Newton*, [1896] P. 36; 65 L. J. P. 15.

(*y*) *Carter* v. *Carter*, [1896] P. 35; 65 L. J. P. 48; 20 & 21 Vict. c. 85, s. 22. For the husband's liability for his wife's alimony *pendente lite*, see the different treatises on Divorce Law; for such maintenance is of a peculiar character, and limited to the jurisdiction and practice of the Divorce Court.

(*z*) 44 & 45 Vict. c. 58, s. 145 (1).

rank to be deducted and appropriated towards the maintenance of his wife (*a*).

The liability of the husband to be bound by the contracts of his wife for the supply of necessaries will be dealt with in chap. xii., which treats of Contracts by Married Women.

Summary Jurisdiction (Married Women) Act, 1895.—Under this Act (*b*), which repeals the Married Women (Maintenance in case of Desertion) Act, 1886 (*c*), a husband who deserts his wife, or is guilty of persistent cruelty to her, or wilfully neglects to provide reasonable maintenance for her or her infant children whom he is legally bound to maintain, and has by such cruelty or neglect caused her to leave and live separately and apart from him (*d*), may be ordered on a summons heard by justices in petty sessions (*e*) to pay to his wife or some other person on her behalf a weekly sum not exceeding £2 (*f*), and a sum not exceeding 10s. a week for the maintenance of each child up to the age of sixteen years may be included in the order (*g*). The Maintenance Orders (Facilities for Enforcement) Act, 1920 (*h*), makes provision for the enforcement in England and Ireland of maintenance orders made in His Majesty's dominions outside the United Kingdom (*i*), and for the transmission of a certified copy to the Governor of any dominion in which a person is resident against whom an order has been made in England or Ireland (*k*). Section 3 gives power to the Courts in England and Ireland to make provisional maintenance orders against persons resident in the dominions, and section 4 enables the Courts in England and Ireland to confirm maintenance orders made out of the United Kingdom. Section 6 sets out the mode of enforcing orders, section 9 authorises the reception of depositions taken in a Court in the dominions in evidence in proceedings under the Act. The adultery of the wife, unless condoned or connived at or conduced to by the husband's wilful

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(*a*) 44 & 45 Vict. c. 58, s. 145 (2).
(*b*) 58 & 59 Vict. c. 39.
(*c*) 49 & 50 Vict. c. 52.
(*d*) Sect. 4.
(*e*) See sect. 8. It is difficult to see how the procedure is to be carried out under this section when the husband has been convicted on indictment.
(*f*) Sect. 5. In fixing the amount evidence should be given of the means of the wife as well as the husband. *Beddington* v. *Beddington*, 127 L. T. 755; 38 T. L. R. 743.
(*g*) Married Women (Maintenance) Act, 1920, c. 63, s. 1 (1). The order must show what is the payment ordered for children.
(*h*) 10 & 11 Geo. V. c. 33.
(*i*) Sect. 1 (1).
(*k*) Sect. 2.

neglect or misconduct, disentitles her to an order under these Acts (*l*). The resumption of cohabitation after an order of judicial separation annuls the order for payment, of the allowance, in like manner as an order of judicial separation pronounced by the High Court is annulled by the resumption of cohabitation by the parties (*m*); and where the wife again leaves her husband she cannot enforce the payment of the allowance (*n*). The presumption of non-access of husband and wife has been held to date from the time of making the order, as in the case of a judicial separation pronounced by the Divorce Court, and on an application to vary an order on account of the wife's adultery, evidence, whether that on the part of the husband or the wife, in proof of the paternity of a child born more than nine months after the separation is receivable (*o*). This case was referred to in *Russell* v. *Russell* (*p*), with approval by Lord Finlay, who said that Sir J. Hannen pointed out with some fullness that the separation order had the effect of a judicial separation; that all presumptions arising from the state of marriage were at an end, and that any child born more than nine months after the separation was presumably illegitimate. Horridge, J., has laid down that the rule of the Ecclesiastical Courts, which assumed that husband and wife have no access during the existence of a divorce, applies to the case of a magistrate's separation order (*q*).

Procedure.—It was held under the earlier Act that hearing the case of assault and ordering the husband to pay the wife an allowance formed one proceeding, and the Court after convicting him could not hear evidence as to his means (*r*); but it would now appear that the wife, after the conviction of the husband of an aggravated assault, may apply for a summons for an order under this Act, which is to be issued and made returnable immediately upon the conviction (*s*). This would enable the husband to call evidence as to his means and the means of the wife, for the application for the order would be a separate proceeding. Any application to vary or discharge an order made under this Act must be made to a court of summary jurisdiction of the district

(*l*) Sect. 6. For the effect of the proviso in this section, see per Jeune, P., in *Symons* v. *Symons*, [1897] P. 176; 66 L. J. P. 81.
(*m*) Sect. 7.
(*n*) *Haddon* v. *Haddon*, 18 Q. B. D. 778; 56 L. J. Q. B. 69.
(*o*) *Hetherington* v. *Hetherington*, 12 P. D. 112; 57 L. J. P. 78.
(*p*) [1924] A. C. 687.
(*q*) *Andrews* v. *Andrews and Chalmers*, [1924] P. 255; 93 L. J. P. 137.
(*r*) *Powell* v. *Powell*, 14 P. D. 177.
(*s*) Sect. 8.

in which the original order was made (*t*); and such court has power to alter, vary, or discharge any such order on satisfactory fresh evidence (*u*). There is no jurisdiction, in the absence of evidence of misconduct of the wife, to vary an order giving her the custody of the children of the marriage (*x*). Appeals under the Act lie from any order or refusal of any order by a court of summary jurisdiction to the Probate, Divorce, and Admiralty Division of the High Court (*y*); but can only be made as to the order for separation and maintenance, and not as to the conviction for assault (*z*). The court has absolute jurisdiction as to costs, and if the husband is not ordered to pay costs, the wife's solicitor cannot sue the husband for them (*a*). The costs of the wife on the appeal whether it is successful or not are to be paid by the husband (*b*). It would seem that there is no power under section 11 in a court of summary jurisdiction to state a case for the superior court on a point of law, as the effect of the section is to give a direct right of appeal to the Probate Division, from which fact it may be inferred that no other form of appeal was intended (*c*). The Divisional Court is not bound by the findings of fact, but is entitled to draw different inferences of fact from the evidence (*d*). These appeals are not under the Divorce Act, but are governed by the practice regulated by Order LXIX., rr. 4 (a), 7, 8, 10, 11, 12, and 16 (*e*).

(*t*) Sect. 7. This includes orders made under the repealed Acts, 41 Vict. c. 19, s. 4, and 49 & 50 Vict. c. 52.

(*u*) Such fresh evidence must be of a nature that would afford ground for a new trial or rehearing in any other class of case; as, for instance, evidence that could not reasonably have been made available at the date of the order, or such as must relate to something that has happened since the date of the order, and affords statutory grounds for revision. *Johnson* v. *Johnson*, [1900] P. 19; 69 L. J. P. 13; *Weightman* v. *Weightman*, 94 L. T. 620; *Groves* v. *Groves*, 71 J. P. 167; *Timmins* v. *Timmins*, [1919] P. 75; 88 L. J. P. 78. A second application on the same grounds will not be permitted. *Stokes* v. *Stokes*, [1911] P. 195; *Blackledge* v. *Blackledge*, [1913] P. 9; 82 L. J. P. 13.

(*x*) *Cobbe* v. *Cobbe*, 73 J. P. 208.

(*y*) Sect. 11. The justices' clerks are to take full and proper notes of the proceedings before the justices under this Act, in order to inform the Court of Appeal of what has taken place in the Court below (*Robinson* v. *Robinson*, [1898] P. 153; 67 L. J. P. 77); and this includes the reasons given by the Court below for their decision (*Cobb* v. *Cobb*, [1900] P. 145; 69 L. J. P. 52). For the duty of the appellant to provide two copies of the justices' clerk's notes, see *Walton* v. *Walton*, [1900] P. 147; 69 L. J. P. 54.

(*z*) *Lewin* v. *Lewin*, [1891] P. 254; 60 L. J. P. 85.

(*a*) *Cobbett* v. *Wood*, [1908] 2 K. B. 420.

(*b*) *Ellis* v. *Ellis*, [1896] P. 251; *Medway* v. *Medway*, [1900] P. 141; 69 L. J. P. 56; *Pickavance* v. *Pickavance*, [1901] P. 60; 70 L. J. P. 14; *Beddington* v. *Beddington*, 127 L. T. 755. This applies notwithstanding that the husband appellant has been admitted as a poor person. *Hope* v. *Hope*, [1915] P. 125; 84 L. J. P. 176.

(*c*) *Manders* v. *Manders*, [1897] 1 Q. B. 474; 66 L. J. Q. B. 296.

(*d*) *Forster* v. *Forster* (1910), 54 Sol. Jo. 403.

(*e*) *Swoffer* v. *Swoffer*, [1896] P. 131; 65 L. J. P. 82.

These rules do not apply to appeals from orders for enforcing payments, there being no appeal from such orders (*f*), and the High Court has no jurisdiction to enforce an order for payment of an allowance by injunction (*g*); the method of enforcing payment is the same as that for enforcing payment of money under an order of affiliation (*h*). If the court of summary jurisdiction thinks that the questions between the parties can be more conveniently dealt with by the High Court, it may refuse to make an order under the Act, and in such case no appeal lies from its decision (*i*). But the High Court, or a judge thereof, may, in proceedings relating to the same subject-matter as that of the application for an order, direct the court of summary jurisdiction to rehear and determine the same (*k*).

(b) Obligation of Wife to Support Husband and Family.

Prior to the Married Women's Property Act, 1870, there was no common law or statutory liability on a married woman, even if possessed of separate estate, to support her husband or family. When she became a widow, and was of sufficient ability, she was at once rendered liable under the Poor Law Act of Elizabeth (*l*) to maintain her children and grandchildren. In return for the benefits conferred upon her by the Act of 1870 she was rendered for the first time liable (if possessed of separate property) to support her husband and family. Before then the parish or union authorities could not come against her for the charges incurred by them, and so make her contribute towards his or their support (*m*). The Act of 1870 provided that:—

"Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband as by the thirty-third section of the Poor Law Amendment Act, 1868, they may now make and enforce against a husband for the maintenance of his wife who becomes chargeable to any union or parish. . .

"A married woman having separate property shall be subject to all such liability for the maintenance of her children as a widow is now by

(*f*) *Ruther* v. *Ruther*, [1903] 2 K. B. 270; 72 L. J. K. B. 826; *Griffiths* v. *Griffiths*, 25 T. L. R. 544.
(*g*) *Gillett* v. *Gillett*, 14 P. D. 158; 58 L. J. P. 54.
(*h*) Sect. 9. (*i*) Sect. 10.
(*k*) *Ibid.* See *Foulkes* v. *Foulkes*, 69 L. T. 461. Fresh evidence will not be received, as a general rule, by the Divisional Court on appeal. *Snape* v. *Snape*, 62 J. P. 153.
(*l*) 43 Eliz. c. 2, s. 7.
(*m*) *Haley* v. *Bannister*, 4 Madd. 280; *Hodgens* v. *Hodgens*, 4 Cl. & F. 323.

law subject to for the maintenance of her children: provided always, that nothing in this Act shall relieve her husband from any liability at present imposed upon him by law to maintain her children" (*n*).

The husband still remained *prima facie* liable; and separate estate was a necessary condition to a married woman being rendered liable (*o*). Under this fourteenth section a married woman with separate estate was held not liable for the support of her grandchildren (*p*); but by section 21 of the Married Women's Property Act, 1882, her liability is now extended to their support. That section is as follows:—

"A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren as the husband is now by law subject to for the maintenance of her children and grandchildren: provided always, that nothing in this Act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren."

Her liability to maintain her husband is provided for by section 20, which is a re-enactment of section 13 of the Act of 1870. A married woman with separate estate is now brought under the operation of the Poor Law Amendment Act in respect of her statutory liability in the same manner as her husband.

Though a wife is not liable for her husband's debts contracted at an inn where she lives with him, yet her goods brought there are liable to the innkeeper's lien to the amount of the unpaid account of her husband (*q*). This decision recognized the separate title of the wife, but was based on the obligation of an innkeeper to receive all and sundry, without inquiry as to title to goods, in compensation for which obligation he acquired a lien on property brought by a guest, and the fact that the guest has no title is not to deprive him of the lien.

A married woman having separate property is liable for the maintenance of her parents (*r*).

Section 2.

(a) Liability for Wife's Ante-nuptial Debts and Contracts.

Owing to frequent and recent changes of legislation, this question of the liability of the husband and wife for her ante-

(*n*) Sect. 14.
(*o*) See *Peters* v. *Cowie*, 2 Q. B. D. 131; 46 L. J. M. C. 177.
(*p*) *Coleman* v. *Overseers of Birmingham*, 6 Q. B. D. 615; 50 L. J. M. C. 92.
(*q*) *Gordon* v. *Silber*, 25 Q. B. D. 491; 59 L. J. Q. B. 507.
(*r*) Married Women's Property Act, 1908 (8 Edw. VII. c. 27).

nuptial debts and contracts must be considered with reference to four different periods. Spouses married before August 9, 1870, are under the common law. Those married between that date and July 30, 1874, are under the Married Women's Property Act, 1870 (*s*) Those married between the latter date and January 1, 1883, are under the Married Women's Property Act, 1870, Amendment Act, 1874 (*t*). Those married on and after January 1, 1883, are under the Married Women's Property Act, 1882 (*u*).

Husband's Liability at Common Law.—The common law liability of husbands married before August 9, 1870, for the debts contracted by their wives before marriage has been described in the following terms (*x*): "With respect to debts which the wife contracted while single, and remained due at the time of the marriage, the husband is liable, and it is but reasonable that the law which, by the marriage, gives to the husband all his wife's personal estate in possession, and the power of recovering or disposing of all her personal property in action or in contingency, that by possibility may fall into possession during the coverture, should make the husband liable for his wife's debts owing at the period of the marriage. This liability, however, as it originates in the marriage, ceases with it, so that if the debts be not recovered during its continuance, the husband will be discharged if he survive his wife" (*y*), unless the creditor had recovered judgment against them in her lifetime (*z*). If the husband die before the debt is recovered, the wife surviving is liable (*a*). The discharge of the husband will not be altered although he may have received a large fortune with his wife, and it seems to be just, because his liability would have been the same if he had received nothing with her. But a distinction prevails upon this subject which is necessary to be attended to, viz., between such part of the wife's estate which the husband receives *qua maritus*, and such portion of it as does not belong to him in that character, but as the *administrator* of his wife (*b*); in the first case, his responsibility

(*s*) 33 & 34 Vict. c. 93.
(*t*) 37 & 38 Vict. c. 50.
(*u*) 45 & 46 Vict. c. 75. January 1, 1883, is the date of the operation of this Act.
(*x*) 1 Rop. H. & W. 73.
(*y*) Roll. Abr. 351.
(*z*) *Heard* v. *Stamford*, 3 P. Wms. 409; *Mitchinson* v. *Hewson*, 7 Term R. 348; *Bell* v. *Stocker*, 10 Q. B. D. 129; 52 L. J. Q. B. 49.
(*a*) *Woodman* v. *Chapman*, 1 Camp. 189.
(*b*) *Heard* v. *Stamford* (*ubi sup.*).

for his wife's debts due at the period of the marriage determines with her life; in the second, he is liable to answer to the extent of her assets, for since he cannot recover her property outstanding at her death, except as her administrator, it will, as in ordinary cases, be assets to pay her debt (*c*). His liability thus extended to the full extent of the assets received by him in such capacity. In order to free the husband, it was not necessary that the coverture should be determined by death alone; the sole liability of the wife revived on a dissolution of the marriage (*d*) or on a decree of judicial separation (*e*).

Husbands Married between August 9, 1870, and July 30, 1874.—The liability of husbands married between these dates for their wives' ante-nuptial debts was done away with by section 12 of the Act of 1870, which was to the following effect:—

"A husband shall not, by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage; but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy such debts, as if she had continued unmarried" (*f*).

Under this section, if a woman brought a large fortune to her husband, but owed a considerable amount of ante-nuptial debts, her creditors were defeated of their just rights in respect to the property so acquired by the husband. Though of no practical importance now, the immunity of husbands from liability is preserved to them (*g*). But in respect of their wives' ante-nuptial *contracts*, their primary and joint liability remained unaffected, and it was necessary to sue the husbands jointly with their wives (*h*).

Husbands Married between July 30, 1874, and January 1, 1883.—To remedy the mischief just alluded to, the Married Women's Property Act, 1874, was passed; and by its terms the liability of the husband for his wife's ante-nuptial debts was in part restored on the principle enunciated in its preamble, that it

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(*c*) *Turner* v. *Caulfield*, L. R. 7 Ir. Ch. 347.

(*d*) See *Capel* v. *Powell*, 34 L. J. C. P. 168; 17 C. B. (N.S.) 743; and see *In re Beauchamp*, [1904] 1 K. B. 572; 73 L. J. K. B. 311.

(*e*) *Cuenod* v. *Leslie*, [1909] 1 K. B. 880; 78 L. J. K. B. 695.

(*f*) *Conlon* v. *Moore*, 9 Ir. C. L. 190; *Axford* v. *Reid*, 22 Q. B. D. 548; 58 L. J. Q. B. 230.

(*g*) By the proviso in sect. 14 of 45 & 46 Vict. c. 75, to the effect that nothing in that Act should operate to increase the liability of any husband married before the commencement of the Act in respect of any debt of his wife, such debt being an ante-nuptial one.

(*h*) *Hancocks* v. *Lablache*, 3 C. P. D. 197; 47 L. J. C. P. 514.

was not just that the property which a woman had at the time of her marriage should pass to her husband, and that he should not be liable for debts contracted before the marriage. But his liability for her ante-nuptial contracts was placed on the like footing as that for her debts, and for the first time a limited liability in the husband for his wife's ante-nuptial breaches of contract was recognized. The short effect of the Act is to render the husband *prima facie* liable (*i*) for his wife's ante-nuptial debts and breaches of contract, and jointly suable with her (*k*) to the extent of her assets that have come into his hands (*l*). He is liable to the extent of the assets and funds actually in hand, and only to that extent will the judgment be joint against him and his wife, and the latter will be separately liable for the residue of the debt (*m*); so, too, where a judgment is *bona fide* recovered in an action against him in respect of and to the extent of such assets, he is free from further liability involved by such debts in any subsequent action, though commenced before judgment signed in the first action (*n*). Though the husband and wife may be jointly sued for the latter's ante-nuptial debts, if the acton be not brought during coverture, and the wife survives, she is liable for them as a *feme sole* (*o*); but to render the husband liable under this Act, both he and his wife must be jointly sued as at common law during coverture (*p*). The joint liability of the spouses affected by this Act is still preserved (*q*).

A husband domiciled in England and married here to a woman whose ante-nuptial domicil was Jersey (by the law of which a husband is wholly liable for his wife's ante-nuptial debts) was held liable under this Act only to the extent of the wife's assets received by him within section 5 (*r*).

(*i*) This *prima facie* liability renders unnecessary an allegation by the party suing that the husband received assets of his wife on his marriage; it is for the husband to exercise his option of pleading non-liability under the statute. *Matthews* v. *Whittle*, 13 Ch. D. 811; 49 L. J. Ch. 359.

(*k*) Sects. 1 and 2. Under sect. 2 the husband, in addition to any other plea or pleas, may plead that he is not liable to pay the debt, or damages in respect of the assets received by him, or he may confess his liability to some amount, and that he is not liable beyond; if he does not plead such plea he shall be deemed to confess his liability so far as assets are concerned. If the plaintiff allege assets, it would appear that the onus of proving them would be upon him. See Roscoe, N. P. Evidence (17th ed.), p. 1231.

(*l*) Sect. 2.

(*m*) M. W. P. Act, 1874, s. 4.

(*n*) *Fear* v. *Castle*, 8 Q. B. D. 380; 51 L. J. Ch. 279.

(*o*) *Chubb* v. *Stretch*, L. R. 9 Eq. 555; 39 L. J. Ch. 329.

(*p*) *Bell* v. *Stocker*, 10 Q. B. D. 129.

(*q*) See provisos in sects. 13 and 14 of 45 & 46 Vict. c. 75.

(*r*) *De Greuchy* v. *Wills*, 4 C. P. D. 362; 48 L. J. C. P. 726.

Husbands Married on and after January 1, 1883.—A husband marrying under the present law is affected by the provisions of section 14 of 45 & 46 Vict. c. 75, which, so far as is material to the subject under discussion, is as follows:—

"A husband shall be liable for the debts of his wife contracted, and all contracts (*s*) entered into . . . by her before marriage, including any liabilities to which she may be so subject under the Acts relating to joint-stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to, from or through his wife (*t*), after deducting therefrom any payments made by him, and any sums for which judgment may have been *bona fide* recovered against him in any proceeding at law, in respect of any such debts and contracts . . . for or in respect of which his wife was liable before her marriage as aforesaid: but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount or value of such property."

Under this section and section 15 it is not now necessary to bring a joint action against the husband and wife, *i.e.*, during coverture, but the husband may be sued alone, even after the termination of the coverture; and the case of *Bell* v. *Stocker* (*u*) does not apply to husbands married after January 1, 1883. An unsatisfied judgment recovered against a wife for an ante-nuptial debt is no bar to an action for the same against the husband under section 13 of the Married Women's Property Act, 1882 (*x*). But the husband cannot be made liable for an ante-nuptial debt of his wife which has accrued due against the wife more than six years before action brought (*y*).

If a husband marry a wife who has entered into an ante-nuptial contract in a representative capacity as trustee, executrix, or administratrix, he will be liable on it only to the extent of her assets acquired by him (unless recovered by other creditors in *bona fide* suits). If he were to adopt his wife's contract, and in so doing alter in any way the position of the parties, it

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(*s*) "Contract" under this Act includes the acceptance of any trust, or of the office of executrix or administratrix. Sect. 24.

(*t*) It seems that the words "become entitled to, from or through his wife" can only refer to cases where by a settlement, if ante-nuptial (to defeat creditors), or if post-nuptial (without valuable consideration), the husband takes an estate or interest in his wife's real or personal property, or where he survives and takes her undisposed-of real or personal estate, as tenant by the curtesy, or her administrator. In any other way he cannot become "entitled," for his marital rights are by this Act abrogated and swept away.

(*u*) *Ubi sup.*

(*x*) *Beck* v. *Pierce*, 23 Q. B. D. 316; 58 L. J. Q. B. 516.

(*y*) *Ibid.*

is probable that he would be held solely liable, or at any rate jointly liable with her to the full extent, though his conduct might not amount to an actual intermeddling with the trust.

There can be little doubt that an important alteration has been effected by the Act of 1882 as regards the husband's liability for calls, or to be made a contributory in respect of his wife's shares acquired by her before marriage. Section 78 of the Companies Act, 1862 (*z*), made a husband liable as a contributory in respect of such shares. In one case (*a*), in which the bank shares of a woman married in 1878 were settled to her separate use, and remained registered in her name till the bank suspended payment, and calls were made upon the shareholders, including the husband of the married woman, Fry, J., decided that the husband was liable to be made a contributory in respect of his wife's shares, though he had received no assets of his wife on marriage. The ground of the decision was that, although under section 75 of the Companies Act, 1862, the liability of a contributory is a debt from the time of becoming a shareholder, such a liability is a statutory liability, having very peculiar incidents of its own under section 78, which makes the husband himself a contributory, and, consequently, distinguishes such liability from ordinary ante-nuptial debts so as not to be within section 5 of the Act of 1874. The fourteenth section of the Act of 1882 provided that a husband should be liable for his wife's ante-nuptial debts and contracts, "including any liabilities to which she may be so subject under the Acts relating to joint-stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, &c.; but he shall not be liable for the same any further or otherwise."

The Companies Act, 1862, is repealed by the Companies (Consolidation) Act, 1908 (*b*), but in place of the former section 78 it is provided by section 128 that the husband of a female contributory married before the date of the commencement of the Married Women's Property Act, 1882, shall, during the continuance of the marriage, be liable as respects any liability attaching to any shares acquired by her before that date, to contribute to the assets of the company the same sum as she would have been liable to contribute if she had not married,

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(*z*) 25 & 26 Vict. c. 89.

(*a*) *Ex parte Hatcher, Re West of England Bank*, 12 Ch. D. 284; 48 L. J. Ch. 723.

(*b*) 8 Edw. VII. c. 69.

and he shall be a contributory accordingly. Subject as aforesaid, nothing in the Act is to affect the provisions of the Married Women's Property Act, 1882.

(b) Liability of Wife for Ante-nuptial Debts and Contracts.

The liability of a married woman for her ante-nuptial debts and contracts must also be regarded within the like four periods as that of the husband. At common law it has been seen that the liability of the husband for his wife's ante-nuptial debts lasted only during coverture; and if she survived she became liable (*c*); so, too, if he became bankrupt, she became in equity again liable to the extent of her property settled to her separate use (*d*).

Wives Married between August 9, 1870, and July 30, 1874.—Section 12 of the Act of 1870 released a husband from all liability in respect of his wife's ante-nuptial debts, and transferred that liability to the latter, who became liable to be sued alone for them, and any property belonging to her for her separate use was liable to satisfy such debts as if she had continued unmarried. These words are very full and not limited in their sense, and under them her separate property is liable to satisfy the claims of her ante-nuptial creditors, though the fund is subject to a restraint against anticipation; and it is immaterial whether her separate property was settled on marriage or otherwise, and by herself or some third person (*e*). A judgment creditor's charging order on the wife's interest in a fund to her separate use was held a valid encumbrance (*f*); and an execution creditor who had sued a married woman alone under this section was held entitled to seize jewels settled to her separate use by an ante-nuptial settlement (*g*). Her liability to be sued in equity for her ante-nuptial debts was a liability to be sued in equity for the purpose of attaching her separate estate (*h*). There is no need, in entering up the judgment on such an ante-nuptial debt against her, to prove the existence of

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(*c*) *Woodman* v. *Chapman*, 1 Camp. 189.
(*d*) *Chubb* v. *Stretch*, L. R. 9 Eq. 555; 39 L. J. Ch. 329.
(*e*) *Axford* v. *Reid*, 22 Q. B. D. 548; 58 L. J. Q. B. 230.
(*f*) *Sanger* v. *Sanger*, L. R. 11 Eq. 470; 40 L. J. Ch. 372; *London and Provincial Bank* v. *Bogle*, 7 Ch. D. 773; 47 L. J. Ch. 301.
(*g*) *Williams* v. *Mercier*, 10 A. C. 1.
(*h*) Per Cotton, L.J., in *Ex parte Jones, Re Grissell*, 12 Ch. D. 484, 491; 48 L. J. Bk. 109.

separate property at the date of the judgment (*i*). The proper form of judgment in this class of acton is given in *Axford* v. *Reid* (*k*). Women married between these two dates are still solely liable (if at all), notwithstanding recent changes in legislation (*l*).

Wives Married between July 30, 1874, and December 31, 1882.—As the wife could defeat her creditors under the foregoing state of affairs by marrying without a settlement, in which case her husband took all her property not settled to her separate use, but was not liable to be sued for her ante-nuptial debts, this mischief was remedied by the Act of 1874 (*m*), which rendered the husband and wife jointly liable for her ante-nuptial debts, the husband's liability being proportioned to the amount of the assets received by him in right of his wife (*n*). Though the liability of the husband to the extent of the assets received by him in right of his wife is joined to that of the wife under this statute, yet the liability of her separate property (though subject to the restraint against anticipation) to make good the claims of her ante-nuptial creditors remains the same (*o*).

Wives Married on and after January 1, 1883:—

"A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted . . . by her before her marriage; . . . and she may be sued for any such debt; . . . and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts . . . and for all costs recovered in respect thereof: provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt . . . as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed" (*oo*).

The effect of this section enables the ante-nuptial creditor to be paid out of the whole of the property of the married woman,

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(*i*) *Downe* v. *Fletcher*, 21 Q. B. D. 11.

(*k*) 22 Q. B. D. 548; 58 L. J. Q. B. 230. "It is adjudged that the plaintiffs do recover the sum of £ and costs to be taxed against the defendant (the married woman), such sum and costs to be payable out of her separate estate whether subject to any restraint against anticipation or not, and not otherwise." It must be remembered that this decision affects only those married women who come within the provisions of the Act under discussion.

(*l*) 45 & 46 Vict. c. 75, s. 13 (proviso).

(*m*) 37 & 38 Vict. c. 50.

(*n*) See sect. 5 of 37 & 38 Vict. c. 50.

(*o*) *Axford* v. *Reid* (*ubi sup.*).

(*oo*) 45 & 46 Vict. c. 75, s. 13

so far as it is not affected by a valid settlement. Section 19 provides that no restriction against anticipation, contained in any settlement of a woman's own property to be made or entered into by herself, shall have any validity against debts contracted by her before marriage, and in a case (*p*) where a woman married between the incurring of a debt and the date of the judgment it was decided that the judgment did not have the effect of merging the ante-nuptial debt in the judgment debt, so as to take the debt out of the operation of section 19. The husband had formerly been primarily liable either to the full extent of his assets at common law, or to the more modified extent under the Married Women's Property Act, 1874. But now a woman married after January 1, 1883, is made for the first time primarily liable for her ante-nuptial debts and contracts. Not only is the former protection of coverture taken away from her, but she is rendered solely and primarily liable for these liabilities, both where her creditor chooses to proceed against her single-handed, and where he brings his action jointly against her and her husband, and the latter insists upon being recouped for any expenses and charges to which he may have been put in the action in which he is found to be not liable in respect of the ante-nuptial debt, &c. But the effect of section 19, which preserves the effect of restraint upon anticipation, prevents any property settled on her subject to the fetter from being taken in execution for such debt, unless she herself while so indebted has settled it on herself on marriage (*q*). A woman married before the above date may be sued as a *feme sole*, and her separate property rendered chargeable in respect of a liability created before the passing of the Act (*r*).

As regards the debts and contracts made by a wife before marriage in a representative capacity as trustee, executrix, or administratrix, she is *prima facie* liable for them (*s*); and her husband is only jointly liable with her for them in cases where he has acquired or become entitled to any of her property to the extent of the assets received by him (*t*), or where he has acted or intermeddled with the trust or administration (*u*).

(*p*) *Rothschild* v. *Fisher*, [1920] 2 K. B. 243; 89 L. J. K. B. 521.
(*q*) *Jay* v. *Robinson*, 25 Q. B. D. 467; 59 L. J. Q. B. 367; *Birmingham Excelsior Money Society* v. *Lane*, [1904] 1 K. B. 35; 73 L. J. K. B. 28.
(*r*) *The Gloucestershire Banking Co.* v. *Phillipps* (*Creagh, Third Party*), 12 Q. B. D. 533.
(*s*) Sect. 18.
(*t*) Sect. 14.
(*u*) Sect. 24.

Shares and Stock.—A married woman formerly was not at law liable during coverture to be made a contributory in respect of shares and stock held by her previous to marriage; but in equity her separate property alone was liable to make good the claims against her (*x*), and the savings of her separate estate were liable to indemnify her trustee against all calls and liabilities incurred on her behalf in respect of shares standing in the trustee's name (*y*). Under the Act of 1870 she could be the legal owner only of fully paid-up shares, debentures, or other stock in any company or society to which no liability was attached (*z*). Her husband, as has been seen, was liable as a contributory, but only for losses incurred by the company during the period of coverture (*a*), unless he himself was a shareholder (*b*); and he was not liable at all when the company's deed of settlement forbade the husbands of married women shareholders to be placed on the list of contributories in respect of their wives' shares (*c*). But under section 13 of the Married Women's Property Act, 1882, the ante-nuptial debts and contracts for which a married woman is expressly rendered liable include sums for which she may be liable as a contributory either before or after she has been placed on the list of contributories. Some measure of protection is afforded to companies by the proviso "that nothing in this Act shall require or authorize any corporation or joint-stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident, contrary to the provisions of any Act of Parliament, charter, by-law, articles of association, or deed of settlement regulating such corporation or company" (*d*). The liability of a woman married before this Act came into operation in respect of property which, but for its passing, would not have been her separate property, is governed by the Act. As to her separate property to which she became entitled before January 1, 1883, her liability is not increased, but remains the same according to the date of her marriage before the commence-

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(*x*) *Mrs. Mathewman's Case*, L. R. 3 Eq. 781; 36 L. J. Ch. 90.
(*y*) *Butler* v. *Cumpston*, L. R. 7 Eq. 16; 42 L. J. Ch. 824.
(*z*) 33 & 34 Vict. c. 93, ss. 4 and 5.
(*a*) *Ex parte Hatcher*, *Re West of England Bank*, 12 Ch. D. 284; 48 L. J. Ch. 723. (*b*) *Kluht's Case*, 19 L. J. Ch. 305; 3 De G. & S. 210.
(*c*) *Re London, Bombay, and Mediterranean Bank*, 18 Ch. D. 581; 50 L. J. Ch. 557. In this case the company had accepted the wife as a shareholder without any concealment by the husband. But where the company had no notice of the marriage of the female shareholder until the winding up, both husband and wife were held liable. *Murgatroyd's Case* (European Assurance Arbitration). 28 L. T. 105; 17 Sol. Jour. 483. (*d*) Sect. 7.

ment of the Married Women's Property Acts of 1870 and 1874 respectively (*e*). The liability of a married woman for her ante-nuptial debts and contracts was and still is a personal one (*f*); so that if judgment is signed against her, and she fails to satisfy it while possessing means, she may be committed to prison under the Debtors' Act (*g*).

The husband may be sued alone, or jointly with his wife, for her ante-nuptial debts or contracts, at the option of her creditor (*h*). Apart from the provision as to the husband's liability as a contributory under section 128 of the Companies (Consolidation) Act, 1908, dealt with previously, in general where he has received no assets he will not be liable for his wife's ante-nuptial engagements (*i*). But he may have received assets from or through her, and judgment may have been recovered against him (*k*); now, as between husband and wife, the former, if he has been made to satisfy the claims of any of his wife's ante-nuptial creditors, will be entitled to be recouped the amount from her separate estate (for she is now *prima facie* liable for her ante-nuptial debts and contracts) (*l*), except perhaps in such cases as where the property was conveyed to him for the purpose of withdrawing it from his wife's creditors. It has been settled that if he has incurred any costs in defending an action in which he is held not liable, he is entitled to be recouped them, and they become a charge on his wife's separate property (*m*).

Section 3.

(a) Liability of Husband for Wife's Torts.

By the Married Women (Torts) Bill, 1925 (*n*), it is proposed to revolutionize the law with regard to the husband's

(*e*) Sect. 13.
(*f*) *Robinson* v. *Lynes*, [1894] 2 Q. B. 577; 63 L. J. Q. B. 759.
(*g*) *Dillon* v. *Cunningham*, L. R. 8 Ex. 23; 42 L. J. Ex. 11.
(*h*) Sect. 15. (*i*) *Ibid.*
(*k*) *Ibid.* The form of the judgment is as follows: "If it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only."
(*l*) The creditor in any joint action against the husband need not allege in his statement of claim that the husband has received assets from or through his wife. See *Matthews* v. *Whittle*, 13 Ch. D. 811; 49 L. J. Ch. 359.
(*m*) *London and Provincial Bank* v. *Bogle*, 7 Ch. D. 773; 47 L. J. Ch. 301.
(*n*) The Bill which is a Government measure has been passed in the House of Lords, but will not be passed in the Commons until early in 1926.

liability for his wife's torts, by the simple plan of abolishing it. So long as husband and wife were regarded as one person and particularly when that unity resulted in her possessions, so far as they were not protected as separate property, becoming his possessions, the husband's liability had some basis of justice to support it. But with the wife's growing independence of his control, either as to her person or her property, and with the general launching out into business and professional careers of married women who profited as well as spinsters from the Sex Disqualifications Removal Act, 1918 (*o*), the feeling gained strength that wives should bear the consequences of their own torts, and that a husband, merely by reason of being a husband, should not be penalized for a tort with the commission of which he had nothing to do. The bill provides that the husband of a married woman shall not as such be liable to be sued, or be made a party to any action or legal proceeding brought against her, in respect of any tort committed by her whether before or after marriage. The words "and wrongs committed" in section 14 of the Married Women's Property Act, 1882, are to be repealed. The Act is not to apply to actions commenced before May 28, 1925. Therefore, apart from actions begun before that date, the following outline of the law as to a married woman's torts will probably be of historical interest only so far as the husband's liability is concerned, and of practical interest only in regard to her own liability.

Ante-nuptial Torts at Common Law.—The theory of the unity of the spouses prevailed equally as regards the torts of the wife as her contracts, and on marriage the husband became liable for all wrongs committed by her previously to, and for which she remained liable at the date of, the marriage. His liability lasted only during the coverture, and unless he was sued before it terminated (whether by death or other causes) he was released from it. This liability was joint, and rendered it necessary to sue the husband and wife jointly, and it was not enough to sue the husband alone (*p*). The Married Women's Property Act, 1870 (*q*), left his liability untouched; for the twelfth section, which freed the husband from any responsibility for his wife's ante-nuptial contracts, omitted to include her ante-nuptial torts.

(*o*) 10 Geo. V. c. 71.
(*p*) *Mitchinson* v. *Hewson*, 7 T. R. 348.
(*q*) 33 & 34 Vict. c. 93.

Under Married Women's Property Act, 1874.—By the Married Women's Property Act, 1874 (*r*), a husband marrying after that Act came into force was liable for his wife's ante-nuptial torts to the extent only of the assets specified in the Act.

Under Married Women's Property Act, 1882.—By the Married Women's Property Act, 1882 (*s*), a husband married after the Act came into operation (January 1, 1883) was rendered liable only for the wrongs committed by his wife before marriage to the extent of all property whatsoever belonging to her which he shall have acquired, or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bona fide* recovered against him in any proceeding at law, in respect of any such wrongs for or in respect of which his wife was liable before her marriage, but he shall not be liable for the same any further or otherwise.

Post-nuptial Torts at Common Law.—At common law a married woman could not commit a tort (whether libel, slander, conversion or trespass), whether as agent for her husband or not; they were the torts of her husband, and therefore she created as against him a liability (*t*). The tort for which the husband was rendered liable must be a tort pure and simple, and not one founded on or arising out of a contract made by his wife (*u*). Thus it was laid down in *Liverpool Adelphi Loan Association* v. *Fairhurst* (*x*) that an action did not lie against a husband and wife for a false and fraudulent representation by the wife to the plaintiff that she was sole and unmarried at the time of her signing a promissory note as surety to him for a third person, whereby the plaintiff was induced to advance a sum of money to that person; and a fraudulent representation by a wife to induce another to enter into a contract with her was not a tort for which the husband was responsible (*y*).

Where Wife is Agent.—Where the wife is acting as agent for her husband, he will be responsible for her fraud connected with a contract within the scope of her authority (*z*) or for her

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(*r*) 37 & 38 Vict. c. 50. (*s*) 45 & 46 Vict. c. 75.

(*t*) Per Jessel, M.R., in *Wainford* v. *Heyl*, L. R. 20 Eq. 321; 44 L. J. Ch. 567.

(*u*) *Earle* v. *Kingscote*, [1900] 2 Ch. 585; 69 L. J. Ch. 725; *Cole* v. *De Trafford*, 86 L. J. K. B. 764, where the husband was held not liable for an alleged tort arising out of the employment of a servant by the wife.

(*x*) 23 L. J. Ex. 163. See also *Wright* v. *Leonard*, 30 L. J. C. P. 365; 11 C. B. (N.S.) 258.

(*y*) *Edwards* v. *Porter*, [1925] A. C. 1; 94 L. J. H. L. 65.

(*z*) *Taylor* v. *Green*, 8 C. & P. 316.

negligence (*a*), and his responsibility as principal is not affected by legislation in reference to his responsibility as husband.

Termination of Husband's Liability.—The husband's liability ended on the termination of the coverture by death, by dissolution of the marriage (*b*), or upon a decree of judicial separation obtained pending the action for tort and before judgment (*c*), unless the decree was obtained in order to avoid liability for a tort in which the husband acquiesced (*d*).

(b) Liability of Wife for Torts.

Liability of Wife for Ante-nuptial Torts.—At common law, where a woman had committed a tort, and then married, the responsibility became joint. On the termination of the coverture, whether by death, divorce, or judicial separation, she became once more solely liable in respect of the tort, unless it had been satisfied by a judgment against her husband and herself (*e*).

In equity her separate estate was not rendered liable for her ante-nuptial torts; but the marital responsibility was equally recognized as in law (*f*).

The non-liability of a married woman during coverture for her ante-nuptial tort was in no way affected by the Married Women's Property Act, 1870, and her husband remained liable for it. But under the Married Women's Property Act, 1874 (*g*), the liability of each was modified. The action founded on her ante-nuptial tort was primarily joint against her husband and herself, yet if he could successfully prove his non-liability under the Act on the ground of not having received through the marriage any assets in right of his wife, or of having exhausted any such assets in satisfying other ante-nuptial claims against his wife, the latter became solely liable. If the husband possessed certain assets of his wife acquired by him *jure mariti*, he was liable in damages up to their amount, and she was liable to the residue of such damages (*h*).

(*a*) *Miell* v. *English*, 15 L. T. 249.
(*b*) *Capel* v. *Powell*, 34 L. J. C. P. 168; and see *Re Beauchamp*, [1904] 1 K. B. 572; 73 L. J. K. B. 311.
(*c*) *Cuenod* v. *Leslie*, [1909] 1 K. B. 880; 78 L. J. K. B. 695.
(*d*) *Burdett* v. *Horne*, 28 T. L. R. 83.
(*e*) *Vine* v. *Saunders*, 4 Bing. N. C. 96.
(*f*) See *Wainford* v. *Heyl*, L. R. 20 Eq. 321; 44 L. J. Ch. 567.
(*g*) 37 & 38 Vict. c. 50, s. 2.
(*h*) Sect. 4.

Under the Married Women's Property Act, 1882 (*i*), a woman married after that Act came into operation is primarily liable to render compensation out of her separate property for her ante-nuptial torts (*k*). It is true that the party injured by the tort of the wife might jointly sue both the husband and the wife, but if he elected to proceed against the wife alone he could do so (*l*). As has been already shown, in the case of his wife's ante-nuptial contracts (*m*) the husband's liability was limited (*n*), and if in any joint action it was found that he was not liable at all, he was entitled to judgment in his favour, whatever the result of the action against the wife (*o*). The primary liability of the wife for her ante-nuptial torts was rather as regards her husband than as regards the party injured by her tort (*p*); but if the latter elected to insist on suing the wife alone, as he might do, her full liability was clearly established (*q*).

Liability of Wife for Post-nuptial Torts.—The sole liability of a married woman for torts committed by her during coverture was a thing unknown to the common law, and is the direct outcome of the legislation of 1882. Before the Married Women's Property Act of that year, a married woman strictly speaking could not commit a tort; her wrong-doing was the wrong-doing of her husband, and he had to answer for it (*r*); the action in respect of the tort was joint against the husband and wife, because the action could not be brought against the wife without joining the husband, and unless the husband could be joined, the party injured would be without remedy (*s*).

In equity the separate estate of a married woman was rendered liable for her post-nuptial torts committed in respect of her separate property, such as fraudulent misrepresentations (*t*), or breaches of trust (*u*) connected with it, but not for the breach of an implied duty or trust (*x*). Though her separate property was not liable for her general torts, yet its liability for specific torts committed during marriage marks a difference between a married woman's ante-nuptial and post-nuptial torts, for the former did not render her separate property liable to

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(*i*) 45 & 46 Vict. c. 75, s. 15.
(*k*) Sect. 13.
(*l*) Sect. 15.
(*m*) *Ante*, pp. 242 *et seq.*
(*n*) Sect. 14.
(*o*) *Ibid.*
(*p*) Sect. 13.
(*q*) Sect. 15.
(*r*) *Wainford* v. *Heyl*, L. R. 20 Eq. 321; 44 L. J. Ch. 567.
(*s*) *Head* v. *Briscoe*, 5 C. & P. 484.
(*t*) *Savage* v. *Foster*, 9 Mod. 35.
(*u*) *Wainford* v. *Heyl* (*ubi sup.*).
(*x*) *Davies* v. *Stanford*, 61 L. T. 234.

make compensation, while the latter did (*y*). When she is guilty of a tort, such as fraud or the like, she will not be allowed in equity to derive any benefit from it (*z*); thus she will not be allowed to disappoint a mortgagee who has advanced money on the faith of misrepresentations in which she has concurred (*a*); and she has been held bound to make good a representation made on her behalf to the Court while she was an infant, on the faith of which a marriage settlement had been sanctioned (*b*). But where her separate property is subject to the restraint upon anticipation, it cannot be taken to make good her torts, for by no device can the restraint be evaded (*c*). In *Cahill* v. *Cahill* (*d*), however, Lord Blackburn thought that a married woman may be bound in conscience, and therefore compelled in equity, to fulfill her contract, though as a contract it was not binding on her. But in *Bateman* v. *Faber* (*e*), Lindley, M.R., said she is protected against her own fraud.

The married woman is liable for her post-nuptial torts on the dissolution of the marriage, whether by death or divorce (*f*) or decree of judicial separation (*g*), unless satisfaction has been made in respect of them, or the right of action barred by lapse of time.

A married woman, under the Married Women's Property Act, 1882, became liable to be sued alone at the option of the injured party for any tort committed by her, and her husband need not be joined with her in the action (*h*). Satisfaction for her wrong-doing had to be made out of the separate property possessed by her at the time of the wrong done, and not as in the case of her contracts, out of property subsequently acquired by her.

(c) Liability for Wife's Breaches of Trust and Devastavits.

Wife's Ante-nuptial Breaches of Trust and Devastavits. Liability of Husband.—In this, as in other cases, there are

(*y*) *Vaughan* v. *Vanderstegen*, 2 Dr. 363.
(*z*) *Re Lush's Trusts*, L. R. 4 Ch. App. 591.
(*a*) *Sharpe* v. *Foy*, L. R. 4 Ch. App. 35.
(*b*) *Mills* v. *Fox*, 37 Ch. D. 153; 57 L. J. Ch. 56.
(*c*) *Jackson* v. *Hobhouse*, 2 Mer. 483; *Stanley* v. *Stanley*, 7 Ch. D. 589; 47 L. J. Ch. 256; *Re Adamson, Public Trustee* v. *Billing* (1913), W. N. 188 (218); 109 L. T. 25.
(*d*) 8 App. Cas. 437.
(*e*) [1898] 1 Ch. 149; 67 L. J. Ch. 130.
(*f*) *Capel* v. *Powell*, 34 L. J. C. P. 168.
(*g*) *Cuenod* v. *Leslie*, [1909] 1 K. B. 880; 78 L. J. K. B. 695.
(*h*) Sect. 1, sub-s. 2.

distinct periods during each of which the liability of the husband varies. Before 1874, where a *feme sole*, as a trustee, or executrix or administratrix, committed a breach of trust, or wasted the goods of her testator or intestate, and married, her husband was liable for the breach of trust (*i*) or devastavit as long as the coverture lasted (*k*); and his liability for her breaches of trust extended to breaches of trust arising from her negligence, and not merely her active misconduct (*l*). On her death his liability ceased, except in cases where he became her administrator in order to reduce her choses in action into possession, when he was made liable as such administrator for her breach of trust or devastavit to the extent of the assets derived from the reduction of the choses in action into possession (*m*). Under the Married Women's Property Act, 1874 (*n*), the husband's liability for his wife's ante-nuptial breaches of trust or devastavits was limited to the amount of the assets which he had received or might have received in right of his wife. Under the Married Women's Property Act, 1882, he was liable for her ante-nuptial breaches of trust or devastavits to the extent of all property belonging to her which he acquired or became entitled to from or through her (*o*).

Liability of Wife.—The wife was not liable so long as the coverture lasted; but if she survived her husband, she became liable for her ante-nuptial breaches of trust or devastavits which had not been satisfied during coverture (*p*). Under the Act of 1882, she is *solely* liable for her ante-nuptial breaches of trust and devastavits, unless the husband has acted or intermeddled in the trust or administration (*q*), which words would seem to include an adoption or ratification of her acts after marriage.

Liability for Wife's Post-nuptial Breaches of Trust and Devastavits. Liability of Husband.—A breach of trust or devastavit committed by the wife during coverture rendered the husband liable for it; and it was immaterial whether the wife had assumed her representative capacity before or after

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(*i*) *Palmer* v. *Wakefield*, 3 Beav. 227.
(*k*) *Doyle* v. *Blake*, 2 Sch. & Lef. 239.
(*l*) *Bahin* v. *Hughes*, 31 Ch. D. 390; 55 L. J. Ch. 473.
(*m*) 30 Car. II. c. 7.
(*n*) 37 & 38 Vict. c. 50, ss. 2, 5.
(*o*) 45 & 46 Vict. c. 75, s. 14.
(*p*) See *Vaughan* v. *Vanderstegen*, 2 W. R. 293.
(*q*) 45 & 46 Vict. c. 75, s. 24.

marriage (*r*). The marital liability varied according as the principles of the common law or of equity were applied. At common law he was liable during coverture only; and his liability was based on the assumption that as his wife had no power to act alone, his consent to her tort must be presumed (*s*). A constructive assent was sufficient, for a husband living apart (not judicially separated) from his wife was held liable for her devastavits (*t*). On the death of the wife, or the termination of the coverture, the husband's liability generally ceased, except where he was proceeded against in the capacity of administrator of his wife (*u*). In equity, however, the surviving husband (or his estate) was rendered liable for whatever sums came into his own or his wife's hands and were wasted, on the principle that as such assets were trust property, their misapplication would render the trustees chargeable in equity (*x*).

If a husband personally commits waste in respect of property of a person whose executrix or administratrix his wife was, and dies leaving his wife executrix, or she becomes his administratrix, and property of her testator or intestate comes into her hands, the estate of her deceased husband is *pro tanto* discharged of its liability (*y*).

The liability of husbands married before January 1, 1883, was not affected by the coming into operation of the Married Women's Property Act, 1882 (*z*).

Liability of Wife.—A married woman was not liable during coverture for her devastavits or breaches of trust, for in the eye of the law such torts were those of her husband (*a*). After the termination of the coverture, the wife became liable in equity (and it seems in law also) for devastavits committed by her, and by her husband with her consent during the marriage, not only at the suit of creditors, but also of legatees, or next-of-kin (*b*).

(*r*) *Palmer* v. *Wakefield*, 3 Beav. 227; *Kingham* v. *Lee*, 16 L. J. Ch. 491. The husband was, of course, responsible for his own breaches of trust and devastavits committed during the marriage.

(*s*) *Adair* v. *Shaw*, 1 Sch. & Lef. 266.

(*t*) *Paget* v. *Read*, 1 Vern. 143.

(*u*) *Adair* v. *Shaw* (*ubi sup.*).

(*x*) *Ibid.*; *Smith* v. *Smith*, 4 W. R. 316.

(*y*) *Adair* v. *Shaw*, 1 Sch. & Lef. 263; *Tyler* v. *Bell*, 2 Myl. & Cr. 89.

(*z*) 45 & 46 Vict. c. 75, s. 14.

(*a*) *Wainford* v. *Heyl*, L. R. 20 Eq. 321; 44 L. J. Ch. 567.

(*b*) *Adair* v. *Shaw* (*ubi sup.*); *Soddy* v. *Turnbull*, L. R. 1 Ch. App. 494. "With respect to the devastavit of the wife committed during the coverture the husband was liable in law and in equity, as long as both parties were alive, for the acts of his wife as executrix or administratrix: for as she had no power to act alone, his assent was presumed; and it was held that the husband, though living

Liability under Married Women's Property Act, 1882. Liability of Husband.—Under this Act the husband is liable for his wife's ante-nuptial breaches of trust and devastavits only to the extent of any assets which on marriage he has acquired or become entitled to from or through her, unless he has subsequently acted or intermeddled in the trust or administration of the estate of the testator or intestate (*c*). He will not be liable for her post-nuptial breaches of trust or devastavits unless he has acted or intermeddled in the administration. Mere cohabitation will not raise a presumption of intermeddling, there must be some active participation in the tort of the wife, by which the interests of the *cestuis que trustent*, or the interests of the creditors, or legatees, or next-of-kin of the deceased, are injuriously affected.

Liability of Wife.—A married woman is liable to the extent of her separate property for her ante-nuptial breaches of trust and devastavits (*d*). She is also solely liable for these torts committed by her during coverture, whether she has accepted the office of trustee, or executrix, or administratrix before or after marriage, unless her husband has intermeddled with the trust or administration, in which case he becomes jointly liable with her. A married woman administratrix can be attached under section 4 of the Debtors Act, 1869 (*e*), for disobedience to an order of the Court to pay money into Court which she holds as such administratrix (*f*). A difference in the husband's favour is to be noticed between his liability for his wife's torts in her representative capacity, for which he seems to be liable only when he has himself intermeddled and participated in them, and his liability for her torts in her non-representative capacity, for which his full common law liability remained untouched by this Act. On the death of the married woman her separate estate will continue to be responsible for her wrongs.

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separate from his wife, should be charged with her devastavit. If the assets were wasted during the coverture either by the husband or wife, a creditor or legatee of the testator might, it would seem, sue the wife as well as the husband, and if she predeceased him her estate was answerable. Upon the death of the wife, the general rule at law was that the liability of the husband (except as her administrator) for his wife's devastavit, committed as well during coverture as before, ceased. But in equity the surviving husband was liable for whatever assets came to the hands of his wife or his own hands during the coverture." 2 Wms. Exors. p. 1464.

(*c*) Sect. 24

(*d*) *Ibid.*

(*e*) 32 & 33 Vict. c. 62.

(*f*) *Re Turnbull, Turnbull* v. *Nicholas*, [1900] 1 Ch. 180; 66 L. J. Ch. 719.

The Married Women's Property Act, 1882 (*g*), is not retrospective to make a married woman liable for a post-nuptial breach of trust committed by her before the Act came into force (*h*).

Obligation on Surviving Spouse to Bury the Deceased. The husband is bound at law to bury his wife in a suitable manner, that is, the reasonable funeral expenses can be recovered against him (*i*). If he fails in his duty, any person who voluntarily employs an undertaker and pays him for performing the funeral, may recover the reasonable expenses (*k*). This liability continues where the husband and wife are apart, whether because of his absence (*l*), or her living separate from him (*m*); and an infant husband is as much bound as an adult (*n*). It would seem that where a wife dies possessed of separate estate the husband is not thereby relieved from his legal liability to pay for her funeral expenses (*o*). But where he is executor of his wife's will made under a testamentary power of appointment, he may retain out of her estate the amount of her funeral expenses, though her will does not contain a charge for such expenses, and her estate is insolvent (*p*). There is a corresponding duty on the widow to bury her husband; and her infancy does not free her from her liability (*q*).

(*g*) Sect. 1, sub-s. 2.
(*h*) *Davies* v. *Stanford*, 61 L. T. 234.
(*i*) *Ambrose* v. *Kerrison*, 20 L. J. C. P. 135; 10 C. B. 776.
(*k*) *Ibid.*
(*l*) *Jenkins* v. *Tucker*, 1 H. Bl. 90.
(*m*) *Bradshaw* v. *Beard*, 31 L. J. C. P. 273; 12 C. B. (N.S.) 344.
(*n*) *Chapple* v. *Cooper*, 13 M. & W. 252; 13 L. J. Ex. 286.
(*o*) See *Willeter* v. *Dobie*, 4 W. R. 669.
(*p*) *Re McMyn, Lightbown* v. *McMyn*, 33 Ch. D. 575; 55 L. J. Ch. 843.
(*q*) *Chapple* v. *Cooper* (*ubi sup.*).

CHAPTER XII.

CONTRACTS BY MARRIED WOMEN.

This chapter will be divided into five sections, as follows:—

Section 1.—Contracts with Third Persons.

Section 2.—Contracts with their Husbands.

Section 3.—Contracts as Agents whether for Third Persons or their Husbands.

Section 4.—Incidents of Contractual Power.

Section 5.—Liability of Married Women in respect of their Contracts.

Section 1.

Contracts with Third Persons.

At Common Law.—At common law one effect of coverture was the incapacity of a married woman to enter into contracts with third persons binding upon her (*a*). This disability or incapacity was due not only to the theory of her suspended separate existence during marriage, but to the fact that she had no property of her own in respect of which she could contract, for of personalty she had none; and she could not defeat her husband's interest in her realty. A contract, then, of a married woman was "altogether void, and no action would lie against her husband or herself for the breach of it" (*b*). If a married woman executed a promissory note, and after the death of her husband made a fresh promise to pay it without any new consideration, she was not bound by either promise, for the first was null and void for want of capacity to make, and the second because of the want of consideration; and a promise by a married woman to pay a debt barred by the Statute of Limitations was ineffectual (*c*). But in order to carry out the requirements of social life, this strict common law doctrine was modified by

(*a*) *Marshall* v. *Rutton*, 8 T. R. p. 547.

(*b*) Per Curiam, *The Liverpool Adelphi Loan Association* v. *Fairhurst*, 9 Exch. 402; 23 L. J. Ex. 163.

(*c*) *Pittam* v. *Foster*, 1 B. & C. 248.

exceptions; thus, a married woman was enabled to enter into a contract as the agent of her husband, and as such agent she could bind him. If her husband had given her a power of attorney under seal she could have executed a contract under seal on his behalf, so as to bind him or entitle him to sue upon it; or in cases of simple contract, if he had expressly or impliedly held her out as his agent, or expressly or impliedly ratified what she had done (*d*). This agency on her part was, as it is now, a question of fact, which must be proved or rebutted by evidence produced (*e*); and, unless the contrary be shown, she is to be deemed to be contracting so as to bind her separate property (*f*). A married woman was also allowed to make binding contracts in cases where her husband was *civiliter mortuus*, as, for instance, when under a sentence of outlawry or banishment (*g*), or of transportation, or of penal servitude for a term of years or for life (*h*); also where her marriage was dissolved by Act of Parliament (*i*); or where her husband was an alien enemy (*k*), or was an alien who had never been in the kingdom (*l*). These exceptions were "founded on the principle of the husband being under the necessity of absenting himself from this kingdom, and that his return to it was forbidden, and did not depend upon his own will and pleasure" (*m*). So, too, if she carried on in the City of London a trade apart from her husband who was a freeman of the City, she might enter into a binding contract (*n*), and as such trader, or as the wife of a convict, she could be made bankrupt.

In Equity.—In equity the contracting power of a married woman was recognized. The Court of Chancery administering equity allowed her to possess property apart from her husband, over which she exercised sole control, and of which she was capable of disposing (*o*). Equity founded her capacity to contract on a fiction, that it was not the married woman, but her separate property, that was put forward as the contracting party,

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(*d*) *M'George* v. *Egan*, 7 Sc. Rep. 112; see Addison on Contracts.
(*e*) See *Jolly* v. *Rees*, 15 C. B. (N.S.) 628; 33 L. J. C. P. 177.
(*f*) 45 & 46 Vict. c. 75, s. 1, sub-s. 3.
(*g*) *Lady Belknap's Case*, Co. Litt. 132 b; *Newsome* v. *Bowyer*, 3 P. Wms. 37.
(*h*) *Carroll* v. *Blencow*, 4 Esp. 27; *Sparrow* v. *Carruthers*, cited 1 T. R. 6; and 2 Wm. Bl. Rep. 1197.
(*i*) 2 Br. H. & W. 70.
(*k*) *Derry* v. *Duchess of Mazarine*, 1 Lord Raym. 147.
(*l*) *Kay* v. *Duchess of Pienne*, 3 Camp. 123; but see *Barden* v. *Keverberg*, 2 M. & W. 61.
(*m*) 2 Rop. H. & W. 121.
(*n*) *Caudell* v. *Shaw*, 4 T. R. 361.
(*o*) For the growth of Separate Estate, see next chapter.

which would take upon itself all the liabilities arising out of the contract. When a married woman contracted debts or entered into engagements, equity deemed she was honest, and desired to satisfy the first claims of her creditors; it consequently held her separate property liable to make good these engagements. As a result, it was held necessary that, to make a binding contract, a married woman must be possessed of some free separate property at the time of entering into such contract or engagement, which she might reasonably be deemed to have intended to bind, and the plaintiff had to allege and prove this in order to succeed (*p*). The existence of separate property at the time of entering into a contract is still necessary where the obligation was entered into before the date of the passing of the Married Women's Property Act, 1893 (*q*).

Her present full responsibility has been a matter of gradual growth. In an earlier stage of the law it was necessary to show that she had acted with respect to her separate property, that is, that she had evinced an intention to deal with it. This was carried a step further, and her separate property was held bound by her general engagements in writing which did not refer to or make mention of it (*r*). The writing was deemed to be an execution of a power; but this theory was rightly denied by Lord Cottenham in *Owens* v. *Dickenson* (*s*). The liability of her separate estate was put upon its true ground by Turner, L.J., in *Johnson* v. *Gallagher* (*t*); the equitable principle of a married woman's liability being, that where she contracts a debt which she can only satisfy out of her separate estate, the latter will be made liable (*u*), though her husband (*x*) or a stranger (*y*) join in the contract giving rise to the liability.

A married woman who had property settled to her separate use without any restraint or alienation was deemed a *feme sole*, and could dispose of such property as though she were a *feme sole* (*z*). Thus in equity she could contract, rendering her free separate estate liable by bond (*a*), bill of exchange

(*p*) See *Pike* v. *Fitzgibbon*, 17 Ch. D. 454; 49 L. J. Ch. 493.
(*q*) 56 & 57 Vict. c. 63; *Palliser* v. *Gurney*, 19 Q. B. D. 519; 56 L. J. Q. B. 546; *Softlaw* v. *Welch*, [1899] 2 Q. B. 419; 68 L. J. Q. B. 940.
(*r*) *Hulme* v. *Tenant*, 1 Bro. C. C. 16; 1 W. & T. L. C. 521.
(*s*) 4 Jur. 1151.
(*t*) 30 L. J. Ch. 298.
(*u*) *Picard* v. *Hine*, L. R. 5 Ch. App. 274.
(*x*) *Hulme* v. *Tenant* (*ubi sup.*); *Latouche* v. *Latouche*, 34 L. J. Ex. 85.
(*y*) *Heatley* v. *Thomas*, 15 Ves. 596.
(*z*) Sugd. Pow. 173. For the effect of Restraint against Anticipation, see next chapter.
(*a*) *Peacock* v. *Monk*, 2 Ves. 193.

accepted (*b*) or endorsed by her (*c*), promissory note (*d*), or covenant to pay a sum of money (*e*); where she so contracted that she must clearly have intended to bind her separate property, as being the only means of satisfying the obligation into which she had entered (*f*); or where she entered into any general engagement on her part, if it appeared that it was made with reference to and upon the faith or credit of the estate, and whether it was so or not was a question to be judged of by the Court on all the circumstances of the case (*g*); and the onus of proof was on the creditor.

A married woman could contract where she had a power of appointment over property (*h*); but she could not contract so as to bind property which was not her separate property, or over which she had no power of appointment. In exercising the power she must observe all necessary formalities which went to the substance of the power, or her contract was void (*i*), though mere formalities were supplied against her (*k*).

She might have contracted to bind her real estate by deed acknowledged under the Fines and Recoveries Act (*l*), with the concurrence of her husband (*m*); or without his concurrence where she had obtained an order dispensing with it (*n*).

Statutory Capacity.—Within recent years a married woman has acquired the powers of a *feme sole*, and has been enabled to contract in regard to, as well as to dispose of, her property.

On Judicial Separation.—The Divorce and Matrimonial Causes Act, 1857 (*o*), by its twenty-fifth section, enacted that "in every case of a judicial separation the wife shall, from the date of the sentence, and while the separation continues, be considered as a *feme sole* with respect to property of every description which she may acquire, or which may come to or devolve upon her" (*p*). By section 26, it is enacted that in

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(*b*) *Stuart* v. *Lord Kirkwall*, 3 Madd. 387.
(*c*) *MacHenry* v. *Davies*, L. R. 10 Eq. 88; 39 L. J. Ch. 866.
(*d*) *Field* v. *Sowle*, 4 Russ. 112.
(*e*) *Mayd* v. *Field*, 3 Ch. D. 587; 45 L. J. Ch. 699.
(*f*) *London Chartered Bank of Australia* v. *Lemprière*, L. R. 4 P. C. 572; 42 L. J. P. C. 49; *Wainford* v. *Heyl*, L. R. 20 Eq. 321; 44 L. J. Ch. 567.
(*g*) *Johnson* v. *Gallagher*, 30 L. J. Ch. 298.
(*h*) *Marshall* v. *Rutton*, 8 T. R. 545.
(*i*) *Martin* v. *Mitchell*, 2 J. & W. 413.
(*k*) *Stead* v. *Nelson*, 2 Beav. 245.
(*l*) 3 & 4 Wm. IV. c. 74.
(*m*) *Besant* v. *Wood*, 12 Ch. D. 605, 621; 48 L. J. Ch. 497.
(*n*) *Goodchild* v. *Dougal*, 3 Ch. D. 650.
(*o*) 20 & 21 Vict. c. 85.
(*p*) *Dawes* v. *Creyke*, 30 Ch. D. 500; 54 L. J. Ch. 1096; *Davenport* v. *Marshall*, [1902] 1 Ch. 82; 71 L. J. Ch. 29.

every case of a judicial separation the wife shall, while so separated, be considered as a *feme sole* for the purposes of contracts, wrongs and injuries, and suing and being sued in any civil proceeding (*q*); and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant. Provided that where upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use (*r*).

A married woman, deserted by her husband, who had obtained a protection order from a police magistrate within the metropolitan district, or from justices in petty sessions under section 21 of the same Act, or from the judge-ordinary (now the judge of the Probate, Divorce, and Admiralty Division), under 21 & 22 Vict. c. 108, s. 6, was deemed a *feme sole*, as though she had been judicially separated and while the order lasted she obtained all the rights and privileges of a single woman (*rr*).

A wife who has obtained a separation order under the Summary Jurisdiction (Married Women) Act, 1895 (*s*), also acquires the position of a *feme sole*, and presumably the status of a *feme sole*, whether under a decree of or order for judicial separation, or under a protection order from justices, carries with it liability to proceedings under the bankuptcy laws, though she be not a trader (*t*).

Under the Married Women's Property Act (*u*) of 1870 a married woman acquired a capacity to contract which she did not possess before, namely, to effect a policy of insurance upon her own life or on that of her husband for her separate use (*x*).

The Married Women's Property Act, 1882 (*y*), conferred upon her very nearly the full contractual power possessed by a man or an unmarried woman, the principal condition necessary to make her contract valid being the possession of separate

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(*q*) *Re Hughes, Brandon* v. *Hughes*, [1898] 1 Ch. 529; 67 L. J. Ch. 279; see *Boyce* v. *Cox*, [1922] 1 K. B. 149; 91 L. J. K. B. 122; *Brown* v. *Leach*, 94 L. J. K. B. 48, as to suing as a *feme sole* the putative father of her illegitimate child.

(*r*) These sections are now incorporated in section 194 of the Supreme Court of Judicature (Consolidation) Act, 1925. (*rr*) See next chapter.

(*s*) 58 & 59 Vict. c. 39, s. 4, repealing 41 Vict. c. 19, s. 4.

(*t*) Ball, Law of Bankruptcy. (*u*) 33 & 34 Vict. c. 93.

(*x*) Sect. 10.

(*y*) 45 & 46 Vict. c. 75.

property. The Act provided that "a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*" (*z*). The word "contract" includes the acceptance of any trust or of the office of executrix or administratrix (*a*).

Sub-section 3 of section 1 enacted that "every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown." Where a married woman was living with her husband, and made a contract under circumstances consistent with her being the agent of her husband, the fact of her cohabitation with him was, if not a strong presumption of her agency on his behalf, at any rate *prima facie* evidence of it and he had to rebut the presumption; but now the onus is shifted on to the wife to show and prove her agency, if she desire to protect her property. If she renders herself liable on a negotiable instrument, without stating on its face that she is her husband's agent, her liability, so far as he is concerned, is sole and confined to herself. She will, however, be freed from liability where she can prove that she was agent for her husband or some disclosed principal; but where she has acted as agent for an undisclosed principal (other than her husband), the right of the creditor to sue her at his option ought not, it seems, to be defeated by her proving that she was acting for the undisclosed principal, and not to bind her own property.

A married woman cannot validly charge her property which she is restrained from anticipating (*b*). The restraint not only affects her capacity to charge her property during coverture (*c*), but her debt or contract incurred or entered into during coverture cannot be enforced against her property even after coverture has terminated, and the restraint no longer exists (*d*).

A married woman is *prima facie* liable for her contracts, and in respect of obligations arising *quasi ex contractu*. Thus she will be liable generally on her bills of exchange, promissory

(*z*) Sect. 1, sub-s. 2.
(*a*) Sect. 24.
(*b*) *Pike* v. *Fitzgibbon*, 17 Ch. D. 454; 49 L. J. Ch. 493. See the principle in *King* v. *Lucas*, 23 Ch. D. 712; 53 L. J. Ch. 64.
(*c*) *Chapman* v. *Biggs*, 11 Q. B. D. 27.
(*d*) For fuller discussion of this subject, see *post*, chap. xiii., section 4.

notes, and cheques (*e*), and where, having separate estate, she contracts to take shares in her own name in a joint-stock company, which is afterwards wound up (*f*). She will also be liable for the rents and profits of an estate upon which she has entered and occupied under a mistaken impression that it was her own property (*g*); so, too, where she has a general power of appointment over her personalty, and she charges it in favour of her creditors (*h*). She will also be liable for costs of suits improperly instituted against her husband (*i*). She formerly was not, but now will be, liable as to her separate property, on what may be termed an implied *assumpsit*, or on a legal obligation, under the following circumstances: For work done by a solicitor in respect of her property, though there be no actual contract on her part to pay him (*k*); or for work done by a solicitor whom she, as the wife of a lunatic, instructs to act for her and her children in a suit to which she is not a party, and which does not relate to her own property (*l*); or for repayment of money when paid to her under a mistake (*m*); or where money has been paid to her under a consideration which has wholly failed (*n*). Where she carries on a trade she will also be absolutely liable on her contracts (*o*).

After-acquired Property Bound.—In more recent times it seemed only right and proper that where a married woman had a right to contract and did contract, that she should bind not only the property which she possessed at the date of entering into the contract, but that which she afterwards acquired. Malins, V.-C., followed this idea in *Pike* v. *Fitzgibbon* (*p*), in which he held the married lady's subsequently acquired property liable to satisfy debts contracted by her before it came into existence. Parliament gave legislative sanction to the principle enunciated in the Vice-Chancellor's judgment by enacting sub-section 4 of section 1 of the Act under discussion, to the effect that "Every contract entered into by a married

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(*e*) See Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, s. 23.
(*f*) *Mrs. Mathewman's Case*, L. R. 3 Eq. 781; 36 L. J. Ch. 90.
(*g*) See *Wright* v. *Chard*, 29 L. J. Ch. 82, 415.
(*h*) *London Chartered Bank of Australia* v. *Lemprière*, 4 L. R. P. C. 572; 42 L. J. P. C. 49.
(*i*) *M.* v. *C.*, L. R. 2 P. & D. 414; 41 L. J. P. M. & A. 37.
(*k*) *Callow* v. *Howle*, 1 De G. & Sm. 531.
(*l*) *Re Pugh*, 17 Beav. 336.
(*m*) *Wright* v. *Chard* (*ubi sup.*).
(*n*) *Duke of Bolton* v. *Williams*, 2 Ves. 138.
(*o*) Sect. 1, sub-s. 5.
(*p*) 14 Ch. D. 837; 49 L. J. Ch. 493. The learned judge was, however, overruled by the Court of Appeal, 17 Ch. D. 454.

woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." But the effect of this Act is not retrospective; therefore, contracts entered into by married women before the date of its operation would be governed by the law prevailing at the time at which they were made (*q*); so a judgment in an action on a contract made by her before the above date could not be executed against property to which she became entitled after the date of the contract (*r*). This subsequently acquired property must be as free from the restraint against anticipation as the property possessed by the married woman at the time of entering into the contract; from this it follows that after the words "all separate property she may thereafter acquire," words to the effect, "over which she has unfettered power of disposition" must be read.

The contractual capacity, then, of a married woman depended, under this Act, as under the principles of equity, upon the possession of property settled to her separate use (whether by force of the statute or gift of private parties) with which she was free to deal (*s*). Sub-section 3 of section 1 enacts that "Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate estate, unless the contrary be shown." This presumption is conditioned upon her possessing free separate property at the time when she enters into a contract; and where she does not possess any separate property at that period, any such presumption is rebutted. Thus, to make a valid contract under the Act a married woman must still possess some free separate property in respect of which she must be deemed to have contracted (*t*); and the onus of proving that at the time of the contract or incurring the debt she possessed such free separate property was on the person was sought to enforce his right against her (*u*) Separate estate with

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(*q*) *Conolan* v. *Leyland*, 27 Ch. D. 632; 54 L. J. Ch. 123.

(*r*) *Turnbull* v. *Forman*, 15 Q. B. D. 234; 54 L. J. Q. B. 489, approving of *Conolan* v. *Leyland* (*ubi sup.*), and disapproving of the effect of the decision in *Bursill* v. *Tanner*, 13 Q. B. D. 691; *Re Home, Ex parte Home*, 54 L. T. 301; *Smith* v. *Whitlock*, 55 L. J. Q. B. 286.

(*s*) See *post*, chap. xiii., section 4.

(*t*) *Palliser* v. *Gurney*, 19 Q. B. D. 519; 56 L. J. Q. B. 546; *Stogdon* v. *Lee*, [1891] 1 Q. B. D. 661; 60 L. J. Q. B. 669; *Re Shakspear, Deakin* v. *Lakin*, 30 Ch. D. 169; 55 L. J. Ch. 44.

(*u*) *Palliser* v. *Gurney* (*ubi sup.*); *Whitaker* v. *Van der Smissen*, 4 T. L. R. 707; *Everett* v. *Paxton*, 65 L. T. 383

a restraint against anticipation on it is not such free separate property (*x*). If, therefore, a married woman had no existing free separate property at the time of making a contract, such contract was null and void, and did not bind subsequently acquired property, though it might have been free from any such restraint (*y*).

Presumption must be Reasonable.—In a series of cases under this Act it was decided that the presumption in sub-section 3 of section 1 of the Act that her contract is entered into with respect to and to bind her separate property must be a reasonable one, and is not satisfied when at the time of the contract her free separate property is mainly represented by her personal clothing (*z*), or where such is a very small sum of money in proportion to the amount involved in the contract, and she is restrained from anticipating the corpus of her property (*a*); or where the husband would be primarily liable for the contract entered into by her, as for a solicitor's costs incurred by her in procuring a divorce from her husband (*b*). Alimony which has been decreed to a married woman on judicial separation is not separate estate in respect of which she can be deemed to contract (*c*). But if she possessed free separate property, it need not be money or securities for money, but might consist of such articles of luxury as jewelry, furs, or the like, and she might be reasonably deemed to have contracted in respect of such (*d*). Again, where she had income derived from property (which she was restrained from anticipating) paid periodically to her, while such income is unspent and she contracts debts bearing a reasonable proportion to the amount of such unspent income, she will be bound by her contract (*e*). Where, however, a married woman is a member of a trading firm, she will be deemed to have sufficient separate estate to enable her to sue or be sued on her contract, and the fact of her husband being also a member of the firm does not remove that presumption (*f*). If she pay money into Court in order to obtain leave to defend

(*x*) *Re Glanvill, Ellis* v. *Johnson*, 31 Ch. D. 532; 55 L. J. Ch. 325; *Pelton (Brothers)* v. *Harrison*, [1891] 2 Q. B. 422; 60 L. J. Q. B. 742.
(*y*) *Re Shakspear, Deakin* v. *Lakin (ubi sup.)*.
(*z*) *Leake* v. *Driffield*, 24 Q. B. D. 98; 58 L. J. Q. B. 89.
(*a*) *Braunstein* v. *Lewis*, 65 L. T. 449.
(*b*) *Harrison* v. *Harrison*, 13 P. D. 180; 56 L. J. P. 76.
(*c*) *Anderson* v. *Hay*, 7 T. L. R. 113.
(*d*) *Bonner* v. *Lyon*, 38 W. R. 541.
(*e*) *Everett* v. *Paxton (ubi sup.)*. In this case the court was divided, Grantham, J., upholding the decision of the county court judge, which was in accordance with the terms of the text, Smith, J., dissenting.
(*f*) *Eddowes* v. *Argentine Loan and Mercantile Agency Co.*, 62 L. T. 602.

an action brought against her she cannot afterwards be allowed to urge that such money could not properly be taken in execution to satisfy her creditor's claim (*g*). The words in subsection 3 of section 1, "unless the contrary be shown," only admit evidence of there being no free separate property in respect of which a married woman could reasonably be deemed to have contracted and not of any intention or absence of intention so to contract at the time of making the contract (*h*). They would, of course, admit evidence of her contracting as agent and not as principal, whether for her husband or a stranger.

Where a married woman is sued otherwise than in contract, as for example to refund a legacy paid to her when debts of the testator remained unpaid, proof of the existence of separate estate at the time of the contract is not necessary, as in such a case her liability to be sued is general (*i*).

This Act so widely extended the scope of the contractual powers of a married woman that nearly all the ordinary incidents of a full contractual capacity ensue; thus debts contracted by her since the operation of the Act are statute barred if not paid or sufficiently acknowledged within the period of limitation (*k*). A debt contracted by her before this Act came into force is barred after six years if unacknowledged, by analogy to the Statute of Limitations (*l*). So, too, the requirements of the Statute of Frauds must be complied with by her; and she will be liable not only for express but for implied contracts, for which formerly she was not held responsible (*m*). Her verbal engagements, too, will not bind her where the statute requires in the case of a *feme sole* that it should be made in writing, as where she verbally undertakes to pay the debt of another (*n*). As a debtor she will be entitled to aliene or dispose of her separate property before her creditor has pro-

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(*g*) *Bird* v. *Barstow*, [1892] 1 Q. B. 94; 61 L. J. Q. B. 1.
(*h*) *Bonner* v. *Lyon*, 38 W. R. 541.
(*i*) *Whittaker* v. *Kershaw*, 45 Ch. D. 230; 60 L. J. Ch. 9.
(*k*) *Re Hastings*, *Hallett* v. *Hastings*, 35 Ch. D. 94; 56 L. J. Ch. 631.
(*l*) *Ibid.* This case explains away and overrules *Norton* v. *Turvill*, 2 P. Wms. 144, and *Hodgson* v. *Williamson*, 15 Ch. D. 87. In these two cases the statute was held not to run against her creditor's claim, which was held to be in the nature of a charge upon a trust fund in existence, and the statute does not apply to trusts. But this doctrine was erroneous, and is long since exploded. Lord Redesdale has said the proper expression was "in obedience to," and not "by analogy to," the statutes. See *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 630.
(*m*) *Jones* v. *Harris*, 9 Ves. 493; *Aguilar* v. *Aguilar*, 5 Madd. 414.
(*n*) *Re Sykes' Trusts*, 6 L. T. 350.

ceeded to judgment, and the Court will not restrain her, pending proceedings, from alienating her separate property (*o*).

Specific Performance.—There is now no reason why a decree of specific performance should not be pronounced against a married woman in respect of her contract, provided she had free separate property at the time of entering into the contract if made before December 5, 1893, and is not incapacitated by any restraint against anticipation from dealing with the property the subject-matter of the decree for performance (*p*). Since the above date the possession of separate property at the date of the contract is not necessary.

If as a non-trader she becomes insolvent, there is no means by which her separate estate can be rateably divided among her creditors, but the claims of the latter will be discharged in order of priority (*q*).

Contracts under Married Women's Property Act, 1893.—A considerable alteration in the law affecting the contractual capacity of married women was effected by the passing of the Married Women's Property Act, 1893 (*r*); but the provisions of this Act are not retrospective (*s*). It has been seen that under the Act of 1882 to render a married woman's contract valid and effective she must have possessed free separate property at the moment of its inception, in respect of which she could reasonably be deemed to have contracted (*t*); that is, there were two conditions precedent to an effective contract by her, (1) the existence of separate property; (2) its freedom from any restraint against anticipation. Section 1 of the Act of 1893 enacts that "Every contract entered into by a married woman, otherwise than as agent, (a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not possessed of or entitled to any separate property at the time when she enters into such contract." The effect of this is to put a married woman on an equal footing with men or unmarried women so far as her contractual capacity and liability depend upon her having or not having any separate estate at the time of making the contract. If she is actually penniless, or has only separate

(*o*) *Robinson* v. *Pickering*, 16 Ch. D. 660; 50 L. J. Ch. 527.
(*p*) Fry, Sp. Perf. 686-690; and see the judgment of Lord Blackburn in *Cahill* v. *Cahill*, 8 App. Cas. p. 436.
(*q*) *Johnson* v. *Gallagher*, 30 L. J. Ch. 298.
(*r*) 56 & 57 Vict. c. 63.
(*s*) See *Softlaw* v. *Welch*, [1899] 2 Q. B. 419; 68 L. J. Q. B. 940.
(*t*) *Ante*, pp. 269 *et seq.*

property which she is restrained from anticipating at the time of entering into a contract, her contract is now valid and will bind any after-acquired free separate property (*u*). It is unnecessary to allege in a statement of claim or prove in an action brought against a married woman on a contract or liability made or incurred since the passing of the Act that she was possessed of separate estate at the date of the contract or incurring the liability, whether the plaintiff seeks summary judgment or not; and *Tetley* v. *Griffith* (*x*) is no longer law as regard contracts made since December 5, 1893. It is equally not necessary to prove the existence of separate property at the date of the judgment; but if as a fact she does not possess any free separate property at the latter date, so far the judgment will be ineffectual; but it would become operative if subsequently she became possessed of free separate property. The contract must be one recognized by law and rendering her liable on it, and a mere acknowledgment subsequent to the Act of sums advanced to her before the Act which she was under no legal liability to repay is not a contract within the section (*y*).

Appointment of Attorney.—The Law of Property Act, 1925 (*z*), further recognizes the power of a married woman to bind herself by enabling her, though an infant, to appoint an attorney on her behalf to execute any deed or do any act she herself might execute or do. The section applies to deeds executed after December 31, 1881.

Effect of Restraint Preserved.—There is a proviso in the Act of 1893 which prevents any impairing of the effect of a restraint against anticipation, making the property affected by it non-available for satisfying any liability or obligation arising out of her contracts; but the fact of the restraint no longer has the effect of rendering the property practically non-existent for contractual purposes (*a*).

It will be observed that in this section (*b*) of the Act the expression "otherwise than as agent" is substituted for "unless the contrary be shown" in sub-section 3 of section 1 of the Act of 1882 (*c*). This is a corollary to the largely increased

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(*u*) Sub-sect. *b*.
(*x*) 57 L. T. 673.
(*y*) *Re Wheeler, Hankinson* v. *Hayter*, [1904] 2 Ch. 66; 73 L. J. Ch. 576.
(*z*) 15 Geo. V. c. 20, s. 129.
(*a*) This overrules *Harrison* v. *Harrison*, 13 P. D. 180; 36 W. R. 748, on this point.
(*b*) Sect. 1.
(*c*) 45 & 46 Vict. c. 75.

contractual capacity flowing from the existence of separate property being no longer necessary to the validity of a married woman's contracts. The presumption against her that her contract is her own is greater than it was under the Act of 1882. The burden of proof that the married woman possessed separate estate is no longer on the creditor; and if she seeks to be quit of the liability incurred by her in her own name, the onus of proof is on her to show that at the time of entering into the contract she was acting as agent for her husband or some third person; and the ordinary principles governing the relations of principal and agent will be as applicable to her as to a man or an unmarried woman.

Bankruptcy.—There is still one important respect in which a married woman is on a different footing to a man or a single woman, viz., her non-liability to be made a bankrupt in respect of her debts and liabilities unless she carries on a trade; that is to say, she is not amenable to the bankruptcy laws in the matter of her ordinary post-nuptial contracts (*d*), even after she has become a widow (*e*), and although her marriage only takes place during the proceedings in bankruptcy it prevents the making of a receiving order (*f*). This non-liability remains unaffected by the Married Women's Property Act, 1893. It may now be said that the only law peculiar to the separate estate of a married woman is the equity principle governing the effect of the restraint against anticipation.

Where, however, a married woman is carrying on a trade (whether separately from her husband or not), she is subject to the bankruptcy laws as if she were a *feme sole*, and section 125, sub-section 2 of the Bankruptcy Act, 1914, provides that where a final judgment or order has been obtained against her, whether or not expressed to be payable out of her separate property, the judgment or order shall be available for bankruptcy proceedings against her by a bankruptcy notice, as though she were personally bound to pay the judgment debt or sum ordered to be paid. Whether she is carrying on a trade is a question to be determined in each case (*g*). An Irish case decided that farming was not a trade (*h*). Continuing to

(*d*) Bankruptcy Act, 1914, s. 125.

(*e*) *Re Hewett, Ex parte Levene*, [1895] 1 Q. B. 328; 64 L. J. Q. B. 185; and see *Re Lynes, Ex parte Lester*, [1893] 2 Q. B. 113; 62 L. J. Q. B. 372.

(*f*) *In re A Debtor*, [1898] 2 Q. B. 576; 67 L. J. Q. B. 820.

(*g*) *In re Dagnall, Ex parte Soan and Morley*, [1896] 2 Q. B. 407; 65 L. J. Q. B. 666.

(*h*) *In re Long*, [1905] 2 Ir. R. 343.

realize assets is carrying on the trade (*i*), and although the business be given up or sold a married woman remains liable to bankruptcy proceedings in respect of unpaid debts incurred therein, or in respect of a judgment on the ground of the negligence of her servant in the business (*k*).

SECTION 2.

Contracts with Husband.

The common law doctrine of the unity of the persons of husband and wife operated to prevent them contracting with each other, and the wife's personality was for most purposes suspended during the coverture. While coverture lasted the wife was incapable at law of contracting with her husband, for if she had been allowed to do so, her separate existence would have been clearly recognized (*l*).

But in equity a married woman was permitted to contract with her husband in respect of her separate estate (*m*), and to sue him with regard to it (*n*). A woman without separate estate was not capable of validly contracting with her husband any more than with a stranger (*o*). A simple post-nuptial contract by a married woman to convey land (not settled to her separate use) to her husband could not be enforced by him even though he had performed his part of the contract (*p*). Where she was at arm's length with her husband, a wife was placed in the position of a single woman, and was able to contract with him (*q*); thus, she might validly contract to live separate from her husband (*r*), or to compromise a divorce suit (*s*). She could also submit matters to arbitration, as the right to compromise is incident to the right to sue (*t*). Under the Married Women's Property Act 1882 (*u*), a married woman,

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(*i*) *In re Reynolds*, [1915] 2 K. B. 186; 84 L. J. K. B. 1348.
(*k*) *In re Allen, Ex parte Shaw*, [1915] 1 K. B. 285; 84 L. J. K. B. 271.
(*l*) *Lanoy* v. *Duchess of Athol*, 2 Atk. 444.
(*m*) *Hewison* v. *Negus*, 22 L. J. Ch. 655; *Teasdale* v. *Braithwaite*, 5 Ch. D. 630; 46 L. J. Ch. 725; *Woodward* v. *Woodward*, 11 W. R. 1007.
(*n*) *Woodward* v. *Woodward* (*ubi sup.*).
(*o*) See *Walrond* v. *Walrond*, John. 18.
(*p*) *Williams* v. *Walker*, 9 Q. B. D. 576.
(*q*) *Vansittart* v. *Vansittart*, 4 K. & J. 62.
(*r*) *Besant* v. *Wood*, 12 Ch. D. 605; 48 L. J. Ch. 497. See *post*, chap. vi., Agreements for Separation.
(*s*) *Hart* v. *Hart*, 18 Ch. D. 670; 50 L. J. Ch. 697.
(*t*) *Macgregor* v. *Macgregor*, 21 Q. B. D. 424; 57 L. J. Q. B. 591. See *Cahill* v. *Cahill*, 8 App. Cas. 420.
(*u*) 45 & 46 Vict. c. 75, sect. 1, sub-s. 2.

so far as her separate estate is concerned, acquired an unlimited power of contracting with all persons, including her husband (*x*); and any property coming to her through a contract with her husband and from him is her separate estate, and any coming from the wife would equally be the husband's (*y*). Thus, where a wife buys furniture or other chattels of the husband, which remain at the matrimonial domicil, and therefore in a position consistent with their being in the possession either of the husband or the wife, possession was attributed to the wife, who had the legal title (*z*), and therefore there was no necessity for the registration of a bill of sale, but if any change in the apparent possession take place, registration as a bill of sale is necessary, and they may execute a valid bill of sale as between each other (*a*).

Gifts and Loans.—Another result of the common law doctrine of the unity of husband and wife was that they could not validly make gifts to one another by any conveyance whether of real or personal property, to take effect in possession, reversion, or remainder (*b*). Their capacity to make a valid bequest to each other was based on the fact that the gift or legacy could not take effect till the coverture was at an end. But equity has altogether modified this doctrine of law; and gifts from one to the other which are *bona fide* and not fraudulent will be supported (*c*). In former times, to make a gift of real estate between husband and wife valid, the parties must have had recourse through the Statute of Uses (*d*), now repealed by the Law of Property Act, 1925. The wife also could take from the husband by a purchase made by him in her name, or in their joint names, which was presumed to have been intended as a gift and advancement to her, unless evidence of a different intention was adduced (*e*). By section 50 of the Conveyancing Act, 1881 (*f*), husband and wife were

(*x*) See *Boston* v. *Boston*, 73 L. J. K. B. 17.

(*y*) This capacity to contract with each other, with the result of the wife taking as her separate property what she obtains from her husband, is seemingly one of the many opportunities the spouses have for practising fraud on each other's creditors.

(*z*) *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18; 63 L. J. Q. B. 513.

(*a*) *Valier* v. *Wright and Bull*, 33 T. L. R. 366.

(*b*) Co. Litt. 187 *b*; 1 Br., H. & W. 29; and see *Phillips* v. *Barnett*, 1 Q. B. D. 440; 45 L. J. Q. B. 277.

(*c*) *Lucas* v. *Lucas*, 1 Atk. 270; *Beard* v. *Beard*, 3 Atk. 72. When such will be deemed fraudulent and void as against creditors, see *ante*, chap. vi., pp. 130 *et seq.*

(*d*) 27 Hen. VIII. c. 10.

(*e*) *Kingdon* v. *Bridges*, 2 Vern. 67.

(*f*) 44 & 45 Vict. c. 41.

rendered capable of conveying to each other their real property and choses in action either alone or jointly with another person. The effect of this section is merged in the wider powers and capacities of the Married Women's Property Act, 1882, and a wife may give to and receive from her husband real property, chattels real and property of every description; and if she be the donee the intervention of a trustee is not requisite. If the effect of the wife's gift of her realty is to convey the legal estate, her acknowledgment under the Fines and Recoveries Act (*g*) formerly had to be taken, but this is now rendered unnecessary (*h*).

Law of Property Act, 1925.—The Law of Property Act, 1925, provides (*i*) that in conveyances made after December 31, 1881, freehold land or a thing in action may be conveyed by a husband to his wife or by a wife to her husband alone or jointly with another person, and further (*k*) that covenants, express or implied, entered into between a person with himself and one or more other persons are as capable of being enforced as if entered into with the other person or persons alone.

Gift of Chattels.—Husband and wife were also able to make a valid gift of chattels to each other, but clear evidence was required of an intention to make the gift, as by an assignment to a trustee in trust for the person to be benefited, or by a distinct and irrevocable act of donation, by which, if necessary, equity deemed the donor to be trustee for the donee (*l*). In order to transfer property by gift there must either be a deed or instrument of gift, or there must be a direct delivery of the thing to the donee (*m*), and where a gift of a motor-car was alleged, but there had been no change of registration of ownership or custody, the gift was held void (*n*).

Gifts by Husband to Wife.—A husband might make a gift of a chattel to his wife by a gift to her separate use to some third person to hold it in trust for her; but the intervention of a trustee was never at any time an absolute necessity (*o*); for the husband might, by some unequivocal and complete act, divest himself of the property in the chattel and constitute

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(*g*) 3 & 4 Wm. IV. c. 74, ss. 77-80, as amended by 45 & 46 Vict. c. 39, s. 7.
(*h*) Law of Property Act (15 Geo. V. c. 20), s. 167.
(*i*) Sect. 72.
(*k*) Sect. 82.
(*l*) See *Mews* v. *Mews*, 15 Beav. 529.
(*m*) Per Abbott, C.J., in *Irons* v. *Smallpiece*, 2 B. & Ald. 551.
(*n*) *Valier* v. *Wright*, 33 T. L. R. 366.
(*o*) *Lady Cowper's Case*, cited in *Graham* v. *Londonderry*, 3 Atk. 393.

himself a trustee for his wife in respect of it. There is a presumption of a gift by the husband where property is purchased or an investment made in the name of the wife (*p*), or if in the joint names, and the wife survives, there is a similar presumption (*q*). Where another person is added, that person is presumed to be a trustee for husband and wife or the survivor (*r*), and where furniture is settled upon the wife for life by a marriage settlement, and has been used by the wife in accordance with the trusts of the settlement, no actual transfer is necessary (*s*). The declaration or intention to make a gift, in order to make the gift from husband to wife valid, must be clear and unequivocal. In the case of a gift of chattels by one stranger to another, there must be a delivery of the chattels in order to make the gift complete, and in the case of husband and wife living together there is no parting with possession by the donor, and consequently the same completeness of gift by delivery is not possible (*t*). An exception to this principle of law was in the case of the wife's paraphernalia (*u*). Gifts by mere transfer from husband to wife were imperfect in their character, and were not perfected in equity, on the principle that a transfer does not operate as a declaration of trust, otherwise every imperfect transaction would be made effectual by being converted into a perfect trust (*x*). But by the operation of the Married Women's Property Act, 1882 (*y*), husband and wife may as freely make gifts to one another both of real and personal property as to strangers, and the intervention of a trustee is no longer necessary in the case of the wife (*z*), and so transactions between husband and wife which formerly were

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(*p*) *Re Eykyn's Trusts*, 6 Ch. D. 115; *Gascoigne* v. *Gascoigne*, [1918] 1 K. B. 223.

(*q*) *Vance* v. *Vance*, 1 Beav. 605; *Re Hicks*, *Hicks* v. *Hicks*, 17 L. T. 360; *Dunbar* v. *Dunbar*, [1909] 2 Ch. 639; *Re Harrison*, *Day* v. *Harrison*, 90 L. J. Ch. 186.

(*r*) *Re Condrin*, *Colohan* v. *Condrin*, [1914] 1 Ir. R. 89.

(*s*) *Re Jacob Magnus*, *Ex parte Salaman*, [1910] 2 K. B. 1049; 80 L. J. K. B. 71.

(*t*) *Milroy* v. *Lord*, 31 L. J. Ch. 798; 4 De G. F. & J. 264; *Grant* v. *Grant*, 34 L. J. Ch. 641; 34 Beav. 623; *Richards* v. *Delbridge*, L. R. 18 Eq. 11; *Re Breton*, *Breton* v. *Woolven*, 17 Ch. D. 416; *Re Whittaker*, *Whittaker* v. *Whittaker*, 21 Ch. D. 657; 51 L. J. Ch. 737. In this last case a piano bought for a wife to learn to play was held to be her separate property.

(*u*) See next chapter, section 8.

(*x*) *Milroy* v. *Lord* (*ubi sup.*), *Richards* v. *Delbridge* (*ubi sup.*), *Re Breton*, *Breton* v. *Woolven* (*ubi sup.*); *Re Whittaker*, *Whittaker* v. *Whittaker* (*ubi sup.*). There have been cases to the contrary, such as *Baddeley* v. *Baddeley*, 9 Ch. D. 113; 26 W. R. 850, and *Fox* v. *Hawks*, 13 Ch. D. 822; 49 L. J. Ch. 579; but their correctness has not been accepted.

(*y*) 45 & 46 Vict. c. 75.

(*z*) Sect. 1, sub-sect. 1.

ineffectual as being but imperfect gifts would now be valid and good assignments. But where the facts still disclose such an imperfect gift, as where the donor took no steps to put the donee in physical possession of the object, when able to do so, but retained that possession himself, equity will, as formerly, refuse to perfect it. After the death of the husband, a gift by him to his wife cannot, as a rule, be established by her uncorroborated evidence, as where the husband made investments in his own name, and there was no evidence of a trust for the wife (*a*); for the position of the parties enables fraud to be easily perpetrated; and the Court, through the infirmity of human testimony, is liable to be deceived. But the inference from a certain state of facts that the surviving spouse made a gift to the deceased spouse may be rebutted by the uncorroborated evidence of the survivor (*b*).

Gifts between husband and wife must be proved, just as gifts between strangers. The following have been held valid gifts between husband and wife: A transfer by the husband of stock already purchased into the wife's name, or their joint names (*c*); a transfer by him in the names of himself and his wife and a stranger, the latter being deemed a trustee for the wife (*d*); allowing a wife to receive a legacy, with the proceeds of which an account at a bank is opened and investments made by her (*e*); a verbal ante-nuptial agreement that money standing to the credit of the wife on deposit at a bank in her maiden name should be her separate property (*f*). Where stock is standing in the sole name of a married woman, the onus of proving that it is not her property is on her husband or those claiming under him (*g*).

The following have been held not to be gifts: Moneys belonging to a husband proved to have been invested by the wife without his consent, for such remain in equity his property (*h*); savings by her out of moneys allowed for household purposes are not the moneys of the wife (*i*) and cannot be invested by

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(*a*) *Re Whittaker, Whittaker* v. *Whittaker*, 21 Ch. D. 657; 51 L. J. Ch. 737.
(*b*) *Green* v. *Carlill*, 4 Ch. D. 882; 46 L. J. Ch. 477.
(*c*) *Lucas* v. *Lucas*, 1 Atk. 270; *George* v. *The Bank of England*, 7 Price, 646; *Re Eykyn's Trusts*, 6 Ch. D. 115.
(*d*) *Re Eykyn's Trusts* (*ubi sup.*).
(*e*) *Parker* v. *Lechmere*, 12 Ch. D. 256.
(*f*) *Ex parte Whitehead, Re Whitehead*, 14 Q. B. D. 419; 54 L. J. Q. B. 240.
(*g*) 45 & 46 Vict. c. 75, ss. 6, 7.
(*h*) *Barrack* v. *M'Culloch*, 5 W. R. 38.
(*i*) *Montgomery* v. *Blows*, [1916] 1 K. B. 899; 85 L. J. K. B. 794.

her as her separate property without his consent (*k*), unless they are living apart (*l*); if such savings are invested in the wife's sole name, the onus of proving that they are not the wife's separate property is on the husband or his representatives (*m*).

Bankruptcy Supervening.—It is not, however, every gift by a husband to a wife that is valid for all purposes; and a gift that may be good as between the parties (*n*) may be ineffectual as against his creditors; so where a gift was for the purpose of preserving the thing given for the enjoyment of the donee, it was held to be a voluntary "settlement of property" within the meaning of section 47 of the Bankruptcy Act, 1883 (*o*), and void against the trustee in bankruptcy of the donor or settlor (*p*); and section 10 of the Married Women's Property Act, 1882, provides that:—

"Nothing in this Act contained shall give validity as against creditors of the husband to any gift by a husband to his wife of any property which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any money so deposited or invested may be followed as if this Act had not passed."

Legacy.—A gift to a wife by way of legacy, with immediate payment directed, does not create priority for the legacy; and if the husband's personal estate is insufficient to pay all the legacies in full, that in favour of the wife is liable to abatement (*q*).

Gifts by Wife to Husband.—The capacity of a wife to make a gift of her separate property to her husband as well as to strangers has long been recognized; and a gift of such property to her husband was deemed to be valid, unless she could prove fraud, duress, or the like, on his part (*r*); in which case the husband would become a trustee for her (*s*). This would seem

(*k*) *Brooke* v. *Brooke*, 17 L. J. Ch. 401; 25 Beav. 342.
(*l*) *Ibid.*
(*m*) 45 & 46 Vict. c. 75, ss. 6, 7.
(*n*) *Groves* v. *Groves*, 3 Yo. & Jer. 163. See also *Curtis* v. *Price*, 12 Ves. 103; *French* v. *French*, 6 De G. M. & G. 95.
(*o*) 46 & 47 Vict. c. 52.
(*p*) *Re Vansittart, Ex parte Brown*, [1893] 1 Q. B. 181. The word "settlement" in this case was held to include a gift of chattels (jewels) from husband to wife.
(*q*) *Re Schweder's Estate, Oppenheim* v. *Schweder*, [1891] 3 Ch. 44. In this case *Blower* v. *Morrett*, 2 Ves. sen. 400, was followed, but *Hardy* v. *Hardy*, 17 Ch. D. 798, was dissented from.
(*r*) *Essex* v. *Atkins*, 14 Ves. 542; *Lynn* v. *Ashton*, 1 R. & M. 190; *Rondeau, Legrand & Co.* v. *Marks*, [1917] 2 K. B. 636; affirmed, [1918] 1 K. B. 75; 87 L. J. K. B. 215.
(*s*) *Wassell* v. *Leggett*, [1896] 1 Ch. 554; 65 L. J. Ch. 240.

to be still the law; and to sustain a gift from the wife to the husband the latter must produce cogent evidence of her intention to make it (*t*); and where the husband is shown to have obtained a large voluntary benefit from his wife, his influence as husband will be presumed; and unless that presumption is displaced the transaction will be set aside (*u*). This onus exists notwithstanding the change introduced by the Married Women's Property Act, 1882.

Where the wife makes a disposition of property in favour of her husband it is essential that the disposition should be made freely and without undue pressure by the husband, and should any question of validity arise the onus is on the husband of showing an absence of undue influence (*x*), and the absence of independent advice, or of a true understanding of the transaction, has been held sufficient to set aside a deed (*y*).

Presumption of Gift. Income.—There is no presumption of a gift from the wife to the husband from the making by her of an investment in his name or in the joint names (*z*). Where, however, the wife puts her money into a business which is managed jointly by the husband and wife, the profits will be deemed to be joint profits (*a*). A gift is more readily assumed in the case of the income of her separate property, and if she pay the income of her separate estate to her husband, that fact may operate as a gift to him (*b*); and if while living together she either pays or allows him to receive such income for joint family purposes, that fact would constitute a gift, and she would not be allowed to recall it (*c*). When there is a question whether a transaction, such as the purchase of land which is conveyed to the husband, amounts to a gift on her part or no, there is no difference of principle applicable depending upon the fund affected being principal or income (*d*). The rule in equity is

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(*t*) *Rich* v. *Cockell*, 9 Ves. 369; *Hughes* v. *Wells*, 9 Ha. 749; *Re Whittaker*, 21 Ch. D. 657; 51 L. J. Ch. 737; *M'Dowell* v. *M'Neilly*, [1917] 1 Ir. R. 117.

(*u*) *Chaplin & Co., Lim.* v. *Brammall*, [1908] 1 K. B. 233; 77 L. J. K. B. 366.

(*x*) *Turnbull & Co.* v. *Duval*, [1902] A. C. 429; 71 L. J. P. C. 84.

(*y*) *Willis* v. *Barron*, [1902] A. C. 271; 71 L. J. Ch. 609; *Talbot* v. *Van Boris*, 27 T. L. R. 266; affirmed, [1911] 1 K. B. 854; *Beck* v. *Beck*, 50 Ir. L. T. 135.

(*z*) *Carnegie* v. *Carnegie*, 31 L. T. 7; *Re Curtis, Hawes* v. *Curtis*, 52 L. T. 244.

(*a*) *Foley* v. *Foley*, [1911] 1 Ir. R. 281.

(*b*) *Woodward* v. *Woodward*, 3 De G. J. & S. 672; and see *Mercier* v. *Mercier*, [1903] 2 Ch. 98; 72 L. J. Ch. 511.

(*c*) *Powell* v. *Hankey*, 2 P. Wms. 82; *Caton* v. *Rideout*, 1 Mac. & G. 599; *Re Young, Trye* v. *Sullivan*, 28 Ch. D. 705; 54 L. J. Ch. 1065; *Edward* v. *Cheyne* (No. 2), 13 App. Cas. 385; *Re Flamank, Wood* v. *Cock*, 40 Ch. D. 461; 58 L. J. Ch. 518.

(*d*) *Mercier* v. *Mercier* (*ubi sup.*).

that, when husband and wife have lived together, the wife cannot charge her husband or her husband's estate as her debtor for arrears of her separate income which she has permitted him to receive. The object of this rule, according to Lord Hardwicke, was to prevent such accounts between husband and wife which it would be impossible to determine according to the rights after the death of the parties (*e*). Thus, if while living together the husband *qua* husband receives his wife's dividends, and she assents to or acquiesces in his expenditure of them in a particular manner for his own purposes, she is not entitled to recall them; but, on the other hand, if they separate and he continue to receive them and so apply them, he would be deemed to receive them as trustee only from the date of the separation, and would be liable to account for them (*f*). Where the wife becomes insane, and therefore not capable of consent, the husband is accountable (*g*), unless there was consent until the time of the lunacy, and after that date the husband expended in excess of the wife's income on her maintenance (*h*).

Capital.—But the above rule is not so applicable where the husband receives the separate capital property of the wife (*i*); thus the transfer of her separate property into her husband's name is not *per se* sufficient evidence of a gift to him for his own use (*k*), even where it can be shown that she allowed the property to be transferred; and the burden is on the husband or his representatives to show that the wife gave him the property (*l*). If the wife is willing to make a gift of her separate estate to her husband, which is transferred into their joint names, but he refuses to accept it and treats the property as his wife's, the husband will be treated as a trustee and not as donee (*m*). But if she knowingly and voluntarily allows her husband to use her

(*e*) Per Lord MacNaghten in *Edward* v. *Cheyne* (*ubi sup.*).
(*f*) See *Dixon* v. *Dixon*, 9 Ch. D. 587.
(*g*) *Mercier* v. *Mercier*, [1903] 2 Ch. 98; 72 L. J. Ch. 511.
(*h*) *Re Lawrence*, *Lawrence* v. *Lawrence* (1916), W. N. 205.
(*i*) *Darkin* v. *Darkin*, 17 Beav. 578; *Scales* v. *Baker*, 28 Beav. 91; *Dixon* v. *Dixon* (*ubi sup.*); *Re Curtis*, *Hawes* v. *Curtis*, 52 L. T. 244; *Re Flamank*, *Wood* v. *Cock* (*ubi sup.*); *Re Hawes*, *Burchell* v. *Hawes*, 62 L. J. Ch. 463. In *Darkin* v. *Darkin* the whole of the purchase money of an estate conveyed to the husband consisted of moneys belonging to the wife which had been invested in the joint names of the husband and wife; after the death of the husband, the widow was held entitled to the property as against the husband's devisee. In *Scales* v. *Baker* the estate was purchased in part out of the wife's separate property and conveyed to the husband, and no intention to make a gift was established: the wife was held entitled to a lien on the estate to the extent of her share of the purchase-money.
(*k*) *Rich* v. *Cockell*, 9 Ves. 369.
(*l*) *Re Curtis*, *Hawes* v. *Curtis*, 52 L. T. 244.
(*m*) *Re Blake*, *Blake* v. *Power*, 60 L. T. 663.

separate capital property for his business purposes and not by way of mere loan, she will be deemed to have made a gift of it to him (*n*); also where she appoints her separate property for his and her own absolute use and benefit, and she and her husband concur in the sale and transfer of such property (*o*). Where a wife living with her husband permits him to make investments with her property in their joint names, the ordinary incidents of property held in joint tenancy apply, and such investments will accrue to the survivor (*p*). A husband has no equity to recoup himself for money which he has expended in improving an estate purchased with his wife's separate property which she was restrained from anticipating; and which money he prevailed on her trustee to advance (*q*). If a husband is a solicitor and his wife is settling her property in his favour, there is a duty cast on him to explain most fully the provisions in his favour, and after his death the burden of proof will lie on his representatives to uphold it (*r*).

Bankruptcy Supervening.—If a married woman carrying on a trade were to make a voluntary gift to her husband under circumstances which would, in the event of her bankruptcy, entitle the trustee to follow the property, the husband would be compelled to restore it. So, too, a gift by a wife trader to her husband of property which continues in her order and disposition would not prevail against the claim of her trustee in bankruptcy (*s*); but such a gift might prevail against her creditors where she was not made a bankrupt.

Loan by Husband to Wife.—A husband formerly at common law could not make a valid loan to his wife, both because it was in the nature of a contract, and whatever property might have passed by delivery reverted to him in virtue of his marital right. But in equity the husband was enabled to sue his wife in respect of her separate estate (*t*). The husband can now make a valid loan to his wife of property, whether specific chattels or other things. The Married Women's Property Act, 1882, has not interfered with his right against his wife's separate property, and he can maintain an action against her to charge

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(*n*) *Gardner* v. *Gardner*, 1 Giff. 126.
(*o*) *Hale* v. *Sheldrake*, 60 L. T. 292.
(*p*) *Re Young, Trye* v. *Sullivan*, 28 Ch. D. 705; 54 L. J. Ch. 1065; *Gascoigne* v. *Gascoigne*, [1918] 1 K. B. 223; 87 L. J. K. B. 333.
(*q*) *Wiles* v. *Cooper*, 9 Beav. 294; 15 L. J. Ch. 129.
(*r*) *Lovesey* v. *Smith*, 15 Ch. D. 655.
(*s*) See 45 & 46 Vict. c. 75, s. 10.
(*t*) *Butler* v. *Butler*, 16 Q. B. D. 374; 55 L. J. Q. B. 55.

her separate estate for money lent by him to her after marriage (*u*). The loan would become the separate property of the wife, and be unaffected by the control of the husband, except so far as he had the right to recall it, when the purposes for which it was made were at an end, or the period for which it was lent was terminated, or he deemed it advisable to recall it.

In the event of the bankruptcy of the wife, it is provided by section 36, sub-section 1 of the Bankruptcy Act, 1914, that the husband shall not be entitled to claim any dividend as a creditor in respect of any money or other estate lent or entrusted by him to his wife for the purposes of her trade or business, until all claims of the other creditors of his wife, for valuable consideration in money or money's worth, have been satisfied.

By Wife to Husband.—In equity the capacity of a wife who had separate estate to make a valid loan to her husband was clearly recognized, and she might have sued her husband, or proved against his estate after death, like any other creditor (*x*). Her capacity for making loans to her husband was fully recognized by section 3 of the Married Women's Property Act, 1882 (*y*); but in respect of them she was postponed till his other creditors had been paid in full.

That section was repealed, but practically re-enacted by section 36, sub-section 2 of the Bankruptcy Act, 1914, which says:—

"Where the husband of a married woman has been adjudged bankrupt, any money or other estate of such woman lent or intrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of his estate, and the wife shall not be entitled to claim any dividend as a creditor in respect of any such money or other estate until all claims of the other creditors of her husband for valuable consideration in money or money's worth have been satisfied. The wife, however, will be entitled to prove in competition with other creditors if she can show that the money was not lent for the purposes of the business" (*z*).

This provision is an application of the principle embodied in the Partnership Law Amendment Act, 1865 (*a*), which was

(*u*) *Butler* v. *Butler* (*ubi sup.*).

(*x*) *Woodward* v. *Woodward*, 11 W. R. 1007. (*y*) 45 & 46 Vict. c. 75.

(*z*) *Re Genese*, *Ex parte District Bank of London*, 16 Q. B. D. 700; 35 L. J. Q. B. 118. This section, it will be seen, adopts the principle of the "reputed ownership" clause of the Bankruptcy Acts, so as to pass to the husband's creditors any property lent to him by his wife, and in his order and disposition; though such reputed ownership must be sole and not joint, *Ex parte Dorman* (L. R. 8 Ch. App. 54; 42 L. J. Bk. 20); thus, furniture, &c., the separate property of the wife, in the joint occupation of the married couple, will not form part of the husband's assets.

(*a*) 28 & 29 Vict. c. 86, s. 5 (Bovill's Act).

repealed and re-enacted by the Partnership Act, 1890 (*b*), that where money is advanced by way of loan to a person engaged in business in consideration of a share in the profits of the business, on such trader being adjudged bankrupt, entering into an arrangement, whether in writing or oral (*c*), to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender shall not be entitled to recover his loan till the claims of the other creditors of the borrower for valuable consideration have been satisfied. The wife living with her husband is deemed to share in a larger manner than his other creditors in the advantages and profits of her loan and advance made to him in the way of his business or trade, whatever the terms as to the interest she is to receive may be (*d*). This principle has been applied where the woman was not lawfully married to but was living with the man (*e*). The third section of the Married Women's Property Act, 1882 is limited in its effect to cases of the *bankruptcy* of the husband, and would not apply to an arrangement to pay a composition to his creditors. By the joint operation of section 3 of 45 & 46 Vict. c. 75, and of section 10 of the Judicature Act, 1875, her claim is liable to be postponed where she is a creditor against the insolvent estate of her husband which is being administered by the Court of Chancery, for the latter section provides that in the administration by the Court of the assets of any person who may die . . . and whose estate may prove insufficient for the payment in full of his debts and liabilities, the rules in bankruptcy shall prevail and be observed as to debts and liabilities provable (*f*); but if the widow be executrix or administratrix of her late husband, whose estate is insolvent, her common law right of retainer is not affected by this section of the Judicature Act, or the third section of the Married Women's Property Act, 1882; and if assets come to her hand as such representative of her husband, she will be allowed to retain out of them the amount of a loan made by her to him in his business out of her separate estate (*g*). Formerly a wife was

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(*b*) 53 & 54 Vict. c. 39, ss. 2 (3 *d*), 3.
(*c*) See *Re Fort, Ex parte Schofield*, [1897] 2 Q. B. 495; 66 L. J. Q. B. 824.
(*d*) Per Cave, J., in *Re Tidswell, Ex parte Tidswell*, 56 L. J. Q. B. 548.
(*e*) *Re Beale, Ex parte Corbridge*, 4 Ch. D. 246; 46 L. J. Bk. 170.
(*f*) *Re May, Crawford* v. *May*, 45 Ch. D. 499; 60 L. J. Ch. 34; *Re Leng, Tarn* v. *Emmerson*, [1895] 1 Ch. 652; 64 L. J. Ch. 468.
(*g*) *Re May, Crawford* v. *May* (*ubi sup.*); *Re Ambler, Woodhead* v. *Ambler*, [1905] 1 Ch. 697; 74 L. J. Ch. 367.

allowed to prove in the administration of her dead husband's estate for the amount of a transaction which amounted to a loan and not a gift on her part (*h*); but with the exception just pointed out that would not now be permitted. The effect of the section under discussion is not retrospective (*i*).

When Claim not Postponed.—The words "or otherwise" in this section which appear also in the Bankruptcy Act, 1914 (*k*), seem to have very little meaning, for they have been held not to refer to a case where a loan was made by a wife to her husband for private purposes, though he was in trade (*l*), or to a case where a loan was made by her to a trading firm of which her husband was a member (*m*). Whatever they may mean they do not cut out the previous limitation, "for the purpose of any trade or business carried on by him" (*n*).

The wife's claim would seem only to be postponed where the loan has been made to the husband as a sole trader. Where she lends money to her husband who is in trade or business, the onus is not on her to show that the money was not lent for the purposes of his trade or business and where the trustee produced no evidence that the money was lent for the purposes of the business and did not cross-examine the wife, she was allowed to prove (*o*). If she take a security for the loan she will be allowed to retain it till her claim has been satisfied (*p*), for the principle of Bovill's Act applies only where the sole security is the personal responsibility of the trader (*q*). If, too, at her husband's request she deposits with his bankers title-deeds of her separate real estate as security for advances to be made by them in his business, and such advances are made and afterwards paid off by her, she is entitled to prove in his bankruptcy for the amounts so paid by her in competition with his other creditors (*r*). The wife is not postponed to other creditors where she takes a bond for the payment of an annuity

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(*h*) *Woodward* v. *Woodward*, 11 W. R. 1007.
(*i*) *Re Home, Ex parte Home*, 54 L. T. 301.
(*k*) S. 36 (2).
(*l*) *Re Tidswell, Ex parte Tidswell* (*ubi sup.*). See *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505; 64 L. J. Ch. 274.
(*m*) *Re Tuff, Ex parte Nottingham*, 19 Q. B. D. 88; 56 L. J. Q. B. 440.
(*n*) By the Court of Appeal in *Re Clark, Ex parte Schulze*, [1898] 2 Q. B. 330; 67 L. J. Q. B. 759.
(*o*) *Re Cronmire, Ex parte Cronmire*, [1901] 1 Q. B. 480; 70 L. J. Q. B. 310. This practically overrules the decision of Cave, J., in *Re Genese, Ex parte District Bank of London*, 16 Q. B. D. 700; 35 L. J. Q. B. 118.
(*p*) *Ex parte Sheil, Re Lonergan*, 4 Ch. D. 789; 46 L. J. Bk. 62.
(*q*) Lind. Part. 59.
(*r*) *Re Cronmire, Ex parte Cronmire* (*ubi sup.*).

in lieu of the money lent (*s*). She will not be postponed where her husband has fraudulently converted her separate property without her consent (*t*). So, too, trustees of a marriage settlement who have power to apply money brought into settlement by the wife for the husband's advancement, and do not advance it for his trading or business purposes on his personal or other security, would not be postponed under this section (*u*).

Equity of Exoneration.—Where she advances money to her husband not for his trade or business purposes, the equity rule which regarded the property of the wife lending money to her husband as a mere surety for his debts, giving her all the rights of a surety, will be preserved. These included the valuable right of having her real estate exonerated after her husband's death out of his real and personal property in cases where she had mortgaged her realty in order to pay off his debts (*x*). But where the money is shown to have been advanced for his trading or business purposes, then the provisions of this section will prevail; and any claim to be exonerated will have effect given to it only after the husband's other creditors have been fully satisfied. If, therefore, a wife join in making a promissory note with her husband who is not in trade but is made bankrupt, though liable on the note she would be entitled to deduct from the sum payable by her the amount of the dividend paid by his estate (*y*). But if the husband were in trade or business she would not be able to set off against the claim against her on the note the amount of the dividend payable by his estate or claim for a dividend till all his creditors had been paid the full amount of their debts.

Statute of Limitations.—In a case where a wife lent money to a husband secured by a bond conditioned to pay interest, and the couple lived together in amity for more than twenty years, and she during coverture never required the interest to be paid to her, and no interest was ever paid, or acknowledgment of the debt ever made, by the husband during coverture, nor for twenty years after he had survived his wife, it was held on the principle that as the hand to pay and to receive was the

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(*s*) *Re Slade, Crewkerne United Breweries* v. *Slade*, [1921] 1 Ch. 160; 89 L. J. Ch. 556.

(*t*) See principle of *Lacey* v. *Hill*, 4 Ch. D. 537; S. C. 3 App. Cas. 94.

(*u*) See *Re Kershaw's Trusts*, L. R. 6 Eq. 322; 37 L. J. Ch. 751.

(*x*) *Earl of Huntingdon* v. *Countess of Huntingdon*, 2 Bro. P. C. 1; *Robinson* v. *Gee*, 1 Ves. sen. 252; *Ferguson* v. *Gibson*, L. R. 14 Eq. 385; 41 L. J. Ch. 640.

(*y*) See *Davies* v. *Jenkins*, 6 Ch. D. 728; 46 L. J. Ch. 761.

same, the Statute of Limitations did not run, and the bond on the death of the husband was still subsisting (*z*).

SECTION 3.

Contracts as Agent.

Coverture did not operate to take away the wife's capacity to be an agent for third persons or for her husband, or in either case to make contracts with their assent or ratification.

Where a married woman is directly employed by a third person as agent, or her engagements are ratified by him, the ordinary law regulating the relations of principal and agent will be applied. Under the Married Women's Property Act, 1882 (*a*), when a married woman enters into a contract she is deemed to do so on her own behalf and with the intent to bind her separate property, unless the contrary is proved, and one method of proving the contrary is by showing she acted as an agent only. Under the Married Women's Property Act, 1893 (*b*), she acquires complete contractual power. Here the phraseology is altered; for it runs: "Every contract hereinafter entered into by a married woman *otherwise than as agent*, shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract." As the law now stands, a married woman who is affected by the Act of 1882 can escape liability for her contracts by showing that she did not possess any separate estate or any free separate estate at the time of the contract, or was acting as agent only; while one who is affected by the Act of 1893 cannot escape unless there is evidence to show that she contracted otherwise than as agent. It is immaterial whether or not the other party knew that she was a married woman (*c*). The question whether a married woman acted as an agent or not turns partly on the form of the contract, and partly on the intention of the parties. Where a widow contracted for a gas supply, and married again, in the absence of notice of the marriage, or notice to discontinue the supply, she was held not to be contracting as agent, and was

(*z*) *Re Dixon, Heynes* v. *Dixon*, [1900] 2 Ch. 561; 69 L. J. Ch. 609.
(*a*) 45 & 46 Vict. c. 75, s. 1, sub-s. 3.
(*b*) 56 & 57 Vict. c. 63, s. 1 (*a*).
(*c*) *Paquin, Lim.* v. *Beauclerk*, [1906] A. C. 148; 75 L. J. K. B. 395.

found liable (*d*). It is immaterial whether the agency is on behalf of third persons or her husband. If a married woman hold herself out as agent, but is found to have no authority to contract as such, she would be liable to an action on the implied warranty, or to an action for deceit, if the other contracting party was unaware of her want of authority.

As Agent for Husband.—If the wife is alleged to have acted on the express authority of her husband, questions of law in the matter can scarcely arise; her express authority must be proved, like the express authority of any other agent, and the only dispute would be as to whether the facts proved did or did not constitute her such express agent. As long as the wife's authority lasts she can render her husband liable for contracts entered into by her within the scope of her authority, but the authority can be revoked at any moment by him (*e*). The husband, too, may be made liable by estoppel through his own conduct, as where he recognizes her authority by paying debts contracted by her (*f*).

The question for discussion is how a wife can act as agent for her husband so as to bind him, or render him liable on contracts, whether for necessaries supplied to her for her use alone, or for the use of the household generally, or on contracts not connected with necessaries. The capacity of the wife to bind her husband as his agent is not a novel doctrine of the law, for it is laid down in Fitzherbert (*g*), that "a man shall be charged in debt for the contract of his bailiff or servant, where he giveth authority to his bailiff or servant to buy and sell for him; and so for the contract of his wife, if he giveth his authority to his wife; otherwise not." The law is also stated by Bayley, J. (*h*), to be as follows: "If a man without any justifiable cause turn away his wife, he is bound by any contract she may make, for necessaries suitable to her degree and estate. If the husband and wife live together, and the husband will not supply her with necessaries, or the means of obtaining them, then although she has her remedy in the ecclesiastical court, yet she is still at liberty to pledge the credit of her husband for what is strictly necessary for her own support. But whenever the husband and wife are living

(*d*) *Lea Bridge District Gas Co.* v. *Malvern*, [1917] 1 K. B. 803; 86 L. J. K. B. 553.
(*e*) *Ex parte Vernall, Re Cook*, 10 Morr. Bank. Rep. 8.
(*f*) *Wallis* v. *Biddick*, 22 W. R. 76. (*g*) F. N. B. G. 120.
(*h*) In *Montague* v. *Benedict*, 3 B. & C. 631, 635.

together, and he provides her with necessaries, the husband is not bound by contracts of the wife except where there is reasonable evidence to show that the wife has made the contract with his assent." Thus the husband's liability may arise from the contract having been made by his wife as his authorized agent, whether connected or not with necessaries, or in respect of necessaries only, from his improper refusal or neglect to supply her with necessaries.

A wife was treated as agent for her husband under circumstances which, if she had been a stranger, would not have constituted her his agent. It was and is a well-recognized principle that no person can be made liable as drawer, indorser, or acceptor of a bill of exchange or promissory note, who has not signed it as such (*i*); but in one case it was held that the drawee of a bill of exchange accepted by his wife in her own name, but by his authority, was liable upon the bill as acceptor (*k*). But now, unless the agency appeared on the face of the instrument, her acceptance in her own name would bind her alone; because, owing to the altered relations between husband and wife, the rule of law as to negotiable instruments would apply equally to them as to strangers; and the presumption is that the liability is that of the wife alone (*l*).

Implied Authority.—Where the wife is only impliedly authorized, as his agent, to contract for necessaries, then the chief difficulties arise, and the scope and extent of her agency and authority can only be gathered from the conduct of the parties. If a husband hold out his wife as his agent, and afterwards become a lunatic, a third person who deals with the wife during his lunacy, but without notice of it, can recover from the husband in respect of a contract made on his behalf, by his wife, during his lunacy, though as between the spouses her agency was determined by his lunacy (*m*). But where a wife was found to have an implied authority to pledge his credit for necessaries, her authority was revoked by his death, even though she had contracted before she could possibly have known of it (*n*). This authority on the part of the wife to

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(*i*) See 45 & 46 Vict. c. 61, s. 23; see also the same section for the exceptions to the rule.

(*k*) *Lindus* v. *Bradwell*, 5 C. B. 583.

(*l*) See 45 & 46 Vict. c. 75, s. 1, sub-s. 3.

(*m*) *Drew* v. *Nunn*, 4 Q. B. D. 661; 48 L. J. Q. B. 591.

(*n*) *Smout* v. *Ilbery*, 10 M. & W. 1; 12 L. J. Ex. 357; *Blades* v. *Free*, 9 B. & C. 167. But these cases may very probably not be followed in the future, as they seem to strain the law.

pledge her husband's credit is not a mere creature of law, but must be based upon some substantial conduct of the husband expressly or impliedly assenting to be bound; thus, where the wife had certain house repairs executed while the husband was a lunatic, she was held not to have had authority to pledge his credit for things other than necessaries, which the repairs were found not to be (*o*); but he would be held liable, though a lunatic, where his wife, having an insufficient allowance, incurred expenses on his behalf which could be brought under the description of necessaries (*p*). The authority of a wife derived from cohabitation to bind her husband's credit does not extend to the borrowing of money by her, though the money is spent by her in the purchase of necessaries (*q*).

The question of the liability of the husband for the contracts of his wife for the supply of necessaries will be divided into two parts:—

(1) Where the contract was made while living with her husband.

(2) Where the contract was made while living apart from her husband.

(1) Where the Contract was Made while Living with Her Husband.—The mere fact of cohabitation does not imply a legal mandate making the wife an agent in law to bind her husband, and to pledge his credit (*r*). His liability for the debts contracted by his wife for necessaries rests solely on the doctrine of principal and agent. The wife cannot bind the husband without his assent, *express* or *implied*, or as it has been put, it is sufficient for her to show that she was a married woman living with her husband, and that the goods were necessaries having regard to the standard of life which with her husband's consent and concurrence she was assuming (*s*). The authority of a wife to pledge the credit of a husband is a delegated, not an inherent authority (*t*). It is the duty of the husband to support his wife and family; and she, as his agent, may make valid contracts on his behalf; but as he has to sustain

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(*o*) *Richardson* v. *Dubois*, L. R. 5 Q. B. 51; 39 L. J. Q. B. 69. See *Smout* v. *Ilbery* (*ubi sup.*).

(*p*) *Read* v. *Legard*, 6 Ex. 636; 20 L. J. Ex. 309.

(*q*) See *Knox* v. *Bushell*, 3 C. B. (N.S.) 334.

(*r*) See the cases of *Debenham* v. *Mellon*, 6 App. Cas. 24; 50 L. J. Q. B. 155; and *Morel* v. *Westmorland (Earl of)*, [1904] A. C. 11; 73 L. J. K. B. 93.

(*s*) Per Collins, L.J., quoted in *Paquin, Lim.* v. *Beauclerk*, [1906] A. C. 148; 75 L. J. K. B. 395.

(*t*) Per Lush, J., in *Eastland* v. *Burchell*, 3 Q. B. D. 435.

the burden of the debts contracted, he is permitted to regulate the expenditure according to his means (*u*).

Presumption of Authority Arises from Cohabitation.—During cohabitation, there is a presumption arising from the very circumstances of the cohabitation of the husband's assent to contracts made by the wife for necessaries suitable to his degree and estate; that is to say, a wife has an implied authority to pledge her husband's credit for such things as fall within the domestic department ordinarily confided to her management, and are necessary and suitable to the style in which her husband chooses to live (*x*); that is, she has the right to pledge his credit for such necessaries until she has notice of his dissent. The presumption of authority does not exist where the wife is living apart from her husband, unless the absence of the husband is due to his business (*y*). Evidence may be given apart from the terms of the contract to show that it was made on behalf of the husband, and to place him in the position of an undisclosed principal (*y*). Naturally if the tradesman elects, with knowledge of the circumstances, to give credit to the wife alone she alone is liable (*z*). Though this presumption extends, as a rule, only to the wife's contracts for goods suitable to the husband's degree and estate, yet if he knowingly permit her to assume an appearance beyond that estate and degree, he will be liable for goods which might reasonably be supplied to a person in her assumed station of life, and the tradesman is not bound to inquire into the truth of her style and appearance, for that concerns her husband alone (*a*). From this it follows that the husband will *not* be responsible for goods supplied to his wife beyond his station in life without his assent (*b*); but it is no defence for the husband to say that his wife is possessed of greater means than his own; he is still bound to maintain her (*z*). It would be going too far to say that extravagance on the part of the wife would negative the presumption of her husband's implied assent, but it would be evidence to go to the jury that she had acted without his authority (*c*). But mere grumbling

(*u*) *Manby* v. *Scott*, 1 Sid. 109.
(*x*) *Etherington* v. *Parrott*, 2 Lord Raym. 1006; *Phillipson* v. *Hayter*, L. R. 6 C. P. 38; 40 L. J. C. P. 14.
(*y*) *Travers* v. *Sen*, 33 T. L. R. 202.
(*z*) *Callot* v. *Nash*, 39 T. L. R. 292.
(*a*) *Waithman* v. *Wakefield*, 1 Camp. 120; *Meredith* v. *Footner*, 12 L. J. Ex. 183.
(*b*) *Montague* v. *Benedict*, 3 B. & C. 631.
(*c*) *Lane* v. *Ironmonger*, 14 L. J. Ex. 35.

or remonstrance on his part at his wife's extravagance would not be sufficient evidence to show that he had withheld his authority from her to purchase expensive articles (*d*).

This presumption holds good not only in the case of a wife, but of a mistress living with a man and who passes for his wife; and it is immaterial whether the person supplying the goods was or was not aware of the relations between them (*e*), and this liability on the man's part will continue, even after the cohabitation has ceased, unless the parties supplying the goods are affected with knowledge of the separation (*f*). The liability would be the same where the delegated person was a sister, or housekeeper, or steward, or bailiff.

Presumption of Wife's Authority Rebuttable.—No man is to be bound against his will, and if the husband, like any other principal, can show that his assumed agent had no authority from him to pledge his credit, it will be open to him to do so. In other words, where a wife is living with her husband, the presumption may be rebutted by showing that she had not such authority. This doctrine was laid down in the two important cases of *Jolly* v. *Rees* (*g*), and *Debenham* v. *Mellon* (*h*), and is now settled law (*i*).

In *Jolly* v. *Rees*, the majority of the Court (Erle, C.J., and Williams and Willes, JJ., Byles, J., dissenting) laid down the following proposition (*k*): "We consider that the wife cannot make a contract binding on her husband unless he gives her authority as his agent to do so. We lay down this as the general rule, premising that the facts do not raise the question,

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(*d*) See *Morgan* v. *Chetwynd*, 4 F. & F. 457.

(*e*) *Watson* v. *Threlkeld*, 2 Esp. 637.

(*f*) *Ryan* v. *Sams*, 12 Q. B. 460; 17 L. J. Q. B. 271; *Monro* v. *de Chemant*, 4 Camp. 215.

(*g*) 15 C. B. (N.S.) 628; 33 L. J. C. P. 177.

(*h*) 6 App. Cas. 24; 50 L. J. Q. B. 155, S. C. in Court of Appeal, 5 Q. B. D. 394.

(*i*) *Morel* v. *Westmorland* (*Earl of*), [1904] A. C. 11; 73 L. J. K. B. 93.

(*k*) 33 L. J. C. P. 177; 15 C. B. (N.S.) 628, at p. 639. The facts of this case were as follows: The goods in respect of which the action was brought were supplied by the plaintiffs upon the orders of Mrs. Rees during the years 1860 and 1861. They consisted of drapery and millinery goods suitable for persons in the position of Mrs. Rees and her daughters. The prices were fair and reasonable. The orders were conveyed by letter, and the goods were directed to Llanelly station, none being sent directly to the defendant's house. The defence set up was, that the wife had a sufficient allowance to enable her to obtain articles of the description of those in question without pledging her husband's credit for them, and that he had expressly prohibited her doing so. It was conceded that the plaintiffs had received no notice of the defendant's prohibition to his wife to pledge his credit. Upon the findings of the jury, the learned judge directed a verdict for the plaintiffs for the amount claimed, but with leave for the defendant to move to enter a verdict for him, if the Court should see fit. The Court entered the verdict for the defendant.

What might have been the rights of the wife, either if she was living separate without any default on her part towards her husband, or if she had been left destitute by him? . . . Where a plaintiff seeks to charge a husband on a contract made by his wife, the question is whether the wife had his authority, express or implied, to make the contract; and that if there be express authority, there is no room for doubt, and if the authority is to be implied, the presumptions which may be advanced on one side may be rebutted on the other; and although there is a presumption that a woman living with a man, and represented by him to be his wife, has his authority to bind him by her contract for articles suitable to that station which he permits her to assume, still this presumption is always open to be rebutted."

In *Debenham* v. *Mellon* (*l*), it was held that where a husband neither does, nor assents to, any act to show that he has held out his wife as his agent to pledge his credit for goods supplied on her order, the question whether she bears that character must be examined upon the circumstances of the case. In the House of Lords, Selborne, L.C., said (*m*): "The first question before your lordships is, whether the mere fact of marriage implies a mandate by law, making the wife (who cannot herself contract, unless so far as she may have separate estate) the agent-in-law of her husband, to bind him, and to pledge his credit, by what otherwise would have been her own contract, if she had been a *feme sole*. On that point, I think it enough to say that, according to all the authorities, there is no such mandate in law from the fact of marriage only, except in the particular case of necessity—a necessity which may arise when the husband has deserted the wife or has by his conduct compelled her to live apart from him, without properly providing for her, but not when the husband and wife are living together,

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(*l*) 6 App. Cas. 24; S. C. Court of Appeal, 5 Q. B. D. 304; 50 L. J. Q. B. 155. The facts of the case were as follows: The plaintiff sued for the price of articles of dress sold by them to the defendant's wife. It was admitted that the prices were reasonable, and it was not disputed that the articles of dress were necessaries for the defendant's wife, in the sense that they were suitable to her degree and condition in life. The defendant relied upon a secret revocation of his wife's authority to pledge his credit. The defendant and his wife were called as witnesses, and stated that by an arrangement made between them he was to furnish her with money to supply herself and her children with clothes, and that he had positively forbidden her to exceed it. They lived together, and an allowance of £52 a year was paid by the husband to the wife for that purpose. In some years the allowance was increased to £62. The judge asked the jury whether, at the time when the goods were ordered, the defendant had withdrawn from his wife authority to pledge his credit, and had forbidden her to do so; the jury answered the question in the affirmative Judgment was entered for the defendant.

(*m*) 6 App. Cas. pp. 31, 32.

and when the wife is properly maintained; because there is, in that state of circumstances, no *prima facie* evidence that the husband is neglecting to discharge his necessary duty, or that there is any necessary occasion for the wife to run him into debt for the purpose of keeping herself alive, or supplying herself with lodging or clothing. I therefore lay aside that proposition; and, thinking it clear that there is no mandate in law by the mere fact of marriage applicable to such a state of circumstances as we have at present to consider, I pass to the next question: whether the law implies a mandate to the wife, from the fact, not of marriage, but of cohabitation? If it does, on what principle? Cohabitation is not (like marriage) a status, or a new contract; it is a general expression for a certain condition of facts. If, therefore, the law did imply any such mandate for cohabitation, it must be as an implication of fact, and not as a conclusion of law." His lordship also stated that though a husband may not intend to hold her out as his agent, and though she may not actually have had authority, he may have so conducted himself as to entitle a tradesman dealing with her to rely upon some appearance of authority for which he ought to be responsible. Lord Blackburn, in the course of his judgment, remarked (*n*): "The question comes to be, first, had she, from her position as wife, authority to pledge her husband's credit, although the husband had revoked that authority? I grant that the fact of a man living with his wife, frequently, and indeed always, does afford evidence that he intrusts her with such authorities as are commonly and ordinarily given by husband and wife. . . . In the ordinary case of the management of a household the wife is the manager of the household, and would necessarily get short and reasonable credit on butchers' and bakers' bills and such things; and for these she would have authority to pledge the credit of the husband. I think that if the husband and wife are living together, that is a presumption of fact from which the jury may infer that the husband really did give his wife such authority. But even then, I do not think the authority would arise, so long as he supplied her with the means of procuring the articles otherwise. But that is not the present question, which is this: Had the wife a mandate to order the clothes which it would be proper for her in her station in life to have, though the husband had forbidden her

(*n*) 6 App. Cas. pp. 36, 37

to pledge his credit, and had given her money to buy clothes? I think, for the reasons given by the majority of the judges in *Jolly* v. *Rees*, and also by the judges in the Court of Appeal in this case, that there is no authority and no principle for saying that the wife had authority to pledge her husband's credit. I quite agree that if the husband knew that the wife had got credit, if he had allowed the tradesman to suppose that he himself had sanctioned the transactions, by paying them, or in other ways, it might very well be argued that he would have given such evidence of authority that if he did revoke it, he would be bound to give notice of the revocation to the tradesmen and to all who had acted upon the faith of his authority and sanction. That would be the general rule, for where an agent is clothed with an authority, and afterwards that authority is revoked, unless that revocation has been made known to those who have dealt with him, they would be entitled to say, 'The principal is precluded from denying that that authority continued to exist, which he had led us to believe, as reasonable people, did formerly exist.'"

If the wife orders necessaries with the authority of the husband while living with him, and there is no inquiry by the tradesman as to her authority and without any knowledge on the part of the tradesman that she is a married woman, she will be taken to have contracted as her husband's agent (*o*).

Defences by Husband.—This implied authority to pledge the husband's credit is not, therefore, a mere creature of law, but must be based upon some substantial conduct of the husband. Where goods within the category of necessaries are supplied to the wife (*p*) living with her husband, she will be deemed to have an implied authority from him to contract (*q*), and the onus is on the latter to show that they were furnished under circumstances not rendering him liable to pay for them (*r*); though evidence is clearly admissible to rebut the implied authority to contract for such goods (*s*), and that credit was given to the wife herself (*t*), or that the orders were extravagant, or that she had

(*o*) *Paquin, Lim.* v. *Beauclerk*, [1906] A. C. 148; 75 L. J. K. B. 395.

(*p*) As to what are necessaries, see *Miss Gray, Lim.* v. *Cathcart (Earl)*, 38 T. L. R. 562.

(*q*) *Emmett* v. *Norton*, 8 C. & P. 506; *Jolly* v. *Rees*, 33 L. J. C. P. 177. *Ruddick* v. *Marsh*, 1 H. & N. 601, has been cited as an authority for this proposition, but it really goes further, and has been questioned by Bramwell, L.J., in *Debenham* v. *Mellon*, 5 Q. B. D. 394; 50 L. J. Q. B. 155.

(*r*) *Clifford* v. *Laton*, 3 C. & P. 15.

(*s*) *Reneaux* v. *Teakle*, 22 L. J. Ex. 241; 8 Exch. 680.

(*t*) *Jewsbury* v. *Newbold*, 26 L. J. Ex. 247.

separate income (*u*). The husband may also show that the goods sought to be charged for were not necessaries, on the ground that his wife was already well supplied with others of the same kind and description (*x*); for a wife supplied with necessaries according to the state and degree in society of her husband, has no right or power without his previous authority or subsequent sanction (*y*) to pledge his credit for expensive articles supplied secretly to her (*z*), even where he sees them, but disapproves of their purchase (*a*).

Where a husband makes his wife a sufficient allowance for household management and supply of necessaries, she cannot pledge his credit without his authority (*b*), as, for instance, where he has forbidden her to use his credit (*c*); and *a fortiori* if the tradesman know of the allowance, and during the husband's temporary absence supply his wife with the goods, the goods in such a case are supplied at the tradesman's peril (*d*). Where the husband sets apart a fund for his wife to draw upon for the household expenses, this is not evidence of a joint liability of husband and wife for necessaries ordered by her, so as to entitle the tradesman after obtaining judgment against the wife in an action against both, to proceed against the husband. The liability is alternative, and signing judgment against the wife amounts to an election to take the remedy against the wife only (*e*). If the husband has held his wife out as his agent and allowed her to contract debts and liabilities in his name, but subsequently withdraws from her that authority, effective notice of such withdrawal must be given to those with whom she has been allowed to contract, and a mere general notice of withdrawal is not sufficient (*f*); and if such notice is not proved to have come to the knowledge of the creditor, the husband will be bound by any contracts his wife may have made with such creditor after the withdrawal. This

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(*u*) *Freestone* v. *Butcher*, 9 C. & P. 643.

(*x*) The proper question to be left to the jury is not whether the articles were or were not necessaries, but whether the wife had authority to pledge her husband's credit. *Reid* v. *Teakle*, 22 L. J. C. P. 161.

(*y*) *Seaton* v. *Benedict*, 5 Bing. 28.

(*z*) *Montague* v. *Baron*, 5 D. & R. 532; *Montague* v. *Benedict*, 3 B. & C. 631; *Montague* v. *Espinasse*, 1 C. & P. 356, 502.

(*a*) *Atkins* v. *Curwood*, 7 C. & P. 567.

(*b*) *Atkyns* v. *Pearce*, 2 C. B. (N.S.) 763; 26 L. J. C. P. 252.

(*c*) *Ex parte Holmes*, *Re Cook*, 10 Morr. Bank. Rep. 12.

(*d*) *Holt* v. *Brien*, 4 B. & A. 252; *Reneaux* v. *Teakle* (*ubi sup.*).

(*e*) *Morel* v. *Westmorland* (*Earl of*) *and wife*, [1904] A. C. 11; 73 L. J. K. B. 93.

(*f*) See *Hodge* v. *Cooper*, 10 L. J. C. P. 218.

is equally so in the case of a woman who lives with a man as his mistress (*g*).

Notice by Husband.—Where the husband gives express notice to tradesmen and others not to allow credit to his wife, and they do so, he is not liable (*h*), but an advertisement in newspapers that the wife has no authority to pledge her husband's credit does not amount to express notice, unless he can prove that it has been brought to the notice of the tradesman (*i*). He can also render himself free from liability by refusing to allow his wife any longer to have the authority to pledge his credit; but this prohibition must be direct, present, positive, and absolute, and not a mere complaint of extravagance or a declaration that he will not pay her bills in the future. It was doubted by Pollock, C.B., in *Johnston* v. *Sumner* (*k*), whether the husband had the power to limit his wife's authority by any private arrangement of the sort. The Chief Baron there said: "If a man and his wife live together, it matters not what private arrangement they make, the wife has all the usual authorities of a wife." This, as a broad and unqualified assertion, cannot now be taken to be law, for it is in direct conflict with the law laid down in *Jolly* v. *Rees* (*l*), and *Debenham* v. *Mellon* (*m*), and was directly questioned in the latter case by Lord Selborne, who said: "When the Chief Baron Pollock, in *Johnston* v. *Sumner*, said, that all the usual authorities of a wife under those circumstances might be assumed, 'notwithstanding any private arrangement,' I suppose him to have in view that state of facts, under cohabitation, when a wife is managing her husband's house and establishment, which usually raises the presumption. If an appearance of authority is once, in fact, created by the husband's acts, or by his assent to the acts of his wife, it may be right to hold, that, as between the husband and a person relying upon that appearance of authority, it cannot be got rid of by a mere private understanding or agreement between the husband and wife."

Estoppel.—From this it follows that though the mere fact that a husband living with his wife and allowing her to manage his household in the usual way does not constitute her his

(*g*) See *Ryan* v. *Sams*, 12 Q. B. 460; 17 L. J. Q. B. 271.
(*h*) *Manby* v. *Scott*, 1 Sid. 109; *Etherington* v. *Parrott*, 2 Lord Raym. 1006.
(*i*) *Hunt* v. *De Blaquiere*, 5 Bing. 550; 7 L. J. (o.s.) C. P. 198; *Swan & Edgar, Lim.* v. *Mathieson*, 27 T. L. R. 153; 103 L. T. 832.
(*k*) 3 H. & N. 261; 27 L. J. Ex. 341.
(*l*) *Ubi sup.*
(*m*) 6 App. Cas. 24; 50 L. J. Q. B. 155.

"ostensible agent" so as to make her contracts binding on him, or require notice to a tradesman not to give her credit in order to protect himself from liability, yet he may be rendered liable on a contract made by his wife, though she has no actual authority, if he has held her out as his authorized agent, or if, knowing she has been contracting as his agent, he stands by and allows another to deal with her as such. The doctrine of estoppel is equally applicable to the relation of husband and wife as to that of other parties, for as Erle, C.J., said, in *Jolly* v. *Rees* (*n*), "the husband as well as every principal is concluded from denying that the agent had such authority as he was held out by his principal to have, in such a manner as to raise a belief in such authority, acted on in making the contracts sought to be enforced. Such liability is not founded on any rights peculiar to the conjugal relation, but on a much wider ground." Where the goods ordered by the wife are consumed in the household and are necessaries, it is a very fair inference to be drawn that the husband assented to his wife's contract. If such goods were not necessaries, stronger evidence would be required to bring home to him the fact that he had assented to their being ordered, and so rendered himself liable for their price. If he sell goods so ordered by his wife, it will be some evidence of his having ordered them (*o*). This estoppel usually arises where he pays the bills sent in by tradesmen for goods ordered by his wife, and so induces the creditor to believe that she had authority to pledge his credit (*p*). In such a case, if the husband wish to protect himself from further liability, he should give specific notice to the tradesmen that the ostensible authority of his wife has been withdrawn. Thus a husband has been held liable for debts contracted by an adulterous wife living under the same roof with him, though he did not cohabit with her (*q*); and a man was similarly held liable for the debts of a woman with whom he had lived as his kept mistress, after the connection ceased but the creditor was ignorant of the separation (*r*).

(2) Contracts Made while Living Apart from Husband. – The separation between husband and wife may be voluntary on both sides, or involuntary on the part of one. Where the wife lives apart from her husband the presumption is that she

(*n*) 15 C. B. (N.S.) 640; 33 L. J. C. P. 177.
(*o*) See *Freestone* v. *Butcher*, 9 C. & P. 643.
(*p*) See *Wallis* v. *Biddick*, 22 W. R. 76.
(*q*) *Norton* v. *Fazan*, 1 B. & P. 226.
(*r*) *Ryan* v. *Sams*, 12 Q. B. 460; 17 L. J. Q. B. 271.

has not authority to bind her husband, even for necessaries; and it is incumbent on the person supplying her with goods to show that she is living apart from her husband under such circumstances as to give her an implied authority to bind him (*s*); and that the goods supplied were necessaries (*t*). The reason of this rule is, that as marriage casts on the husband the duty of supporting his wife, it is just that he should maintain her. But where the wife is living alone, the presumption is rightly the other way; for when the tradesman trusts her, he trusts her as a *feme sole*, or if as a married woman, he must more than suspect that she cannot be on such terms with her husband as to induce the latter to intrust her with authority to bind him by her contracts. Separation is *de facto* a revocation of the wife's authority; and the husband is not bound to notify it to the world at large in order to protect himself (*u*). A protection order or a separation order of magistrates or a decree of judicial separation all have the same effect in freeing the husband from liability for contracts made by his wife (*x*). If a wife with an ample separate income lives apart from her husband (even though such separation is caused by his misconduct), and contracts debts for what would be held to be necessaries, she would not, it seems, have an authority to pledge his credit in respect of them (*y*). But the presumption in favour of the husband, just as the presumption against him, may be rebutted by the facts of the case produced in evidence.

Where Husband is not Liable.—The rule applicable to these questions was thus laid down by Lord Mansfield (*z*): "When husband and wife live separate, the person who gives credit to the wife is to be considered as standing in her place, inasmuch as the husband is bound to maintain her; and the spiritual Court, or a Court of equity, will compel him to grant her an adequate alimony; but if she elope from her husband and live in adultery, or if upon separation the husband agrees to make her a sufficient allowance, *and pays it*, in either of those cases the husband is not liable, because in the former case she forfeits all title to alimony, and in the latter has no further demands on her husband. And as in all cases the creditor is to be considered

(*s*) *Johnston* v. *Sumner*, 3 H. & N. 261; 27 L. J. Ex. 341.
(*t*) *Mainwaring* v. *Leslie*, 2 C. & P. 507.
(*u*) *Wallis* v. *Biddick*, 22 W. R. 76.
(*x*) *Re Wingfield and Blew (Solicitors)*, [1904] 2 Ch. 665; 73 L. J. Ch. 797.
(*y*) See *Freestone* v. *Butcher*, 9 C. & P. 643.
(*z*) In *Ozard* v. *Durnford*, Selw. N. P. 229.

as standing in the wife's place, it imports him, when the wife lives apart from her husband, to make strict inquiry as to the terms of separation, for in such cases he must trust her at his peril." If the wife leave the husband at her own instance and through her own fault, as where she elopes from him and lives in adultery, he is not liable for debts and contracts made by her during the separation, for her adultery (to be proved at the trial) when living apart from him destroys her implied agency to pledge his credit (*a*); and under the poor law he is not liable to support her (*b*). This is so even when he himself has committed adultery and turned his wife out of doors without any imputation upon her, and she subsequently commits adultery (*c*). A wife who commits adultery while living with her husband has the ordinary authority to pledge his credit (*d*). If a husband desert his wife or compel her to leave him but allows her a competent maintenance, he is not liable for goods supplied to her, for such are not "necessaries" if she has the means herself to procure them (*e*). If husband and wife separate on mutual terms, he agreeing to make her a definite allowance which she accepts as sufficient, and which he continues to pay regularly, she cannot by pledging his credit obtain an increase of that allowance; nor is it possible for a creditor who trusts her to make her husband pay more than he has agreed to do (*f*). This separation must be mutual, that is, *bona fide*; and if the wife's consent to separate was obtained by force or fraud, she, though living apart from her husband, would have the like authority to pledge his credit as if he had wrongfully turned her out of his house (*g*). In the absence of an agreement as to an allowance where the husband makes his wife a *sufficient* allowance, and pays it, he is not liable for her debts. The sufficiency of the allowance is a proper question for the consideration of the jury to be determined according to the actual means and position of the husband (*h*); but it is not necessary for the husband to prove that the wife's creditor knew that he

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(*a*) *Ham* v. *Toovey*, Selw. N. P. 268; *Morris* v. *Martin*, Stra. 647; *Emmett* v. *Norton*, 8 C. & P. 506; *Hardie* v. *Grant*, 8 C. & P. 512; *Cooper* v. *Lloyd*, 6 C. B. (N.S.) 519; in this case the wife was permitted to give evidence of her adultery.

(*b*) *Culley* v. *Charman*, 7 Q. B. D. 89; 50 L. J. M. C. 111.

(*c*) *Govier* v. *Hancock*, 6 T. R. 603.

(*d*) *Robinson* v. *Gosnold*, 6 Mod. 171; *Needham* v. *Bremner*, L. R. 1 C. P. 583; 35 L. J. C. P. 313.

(*e*) *Mizen* v. *Pick*, 3 M. & W. 481.

(*f*) *Eastland* v. *Burchell*, 3 Q. B. D. 432; 47 L. J. Q. B. 500.

(*g*) See Lush, Husb. & W. p. 375.

(*h*) *Hodgkinson* v. *Fletcher*, 4 Camp. 70; *Emmett* v. *Norton*, 8 C. & P. 506.

(the husband) made and paid his wife a sufficient allowance (*i*). The wife has no implied authority to pledge the credit of her husband if she has voluntarily agreed to maintain herself (*k*).

Agreement for Separate Maintenance.—Where husband and wife agree to live apart, and a specified allowance has been agreed upon between husband and wife to be made by him to her, which he regularly pays (*l*), he will not be liable for her contracts, and the adequacy of the allowance, even if it prove insufficient, does not concern third parties, and so forms no question for a jury to consider (*m*). The authority the wife possesses is one of necessity only, and if she agree to accept a given allowance as sufficient, she will be deemed to consider it enough to supply herself with the necessaries of life. It is not necessary to free him from responsibility that tradesmen and others should be affected with notice of the separate allowance (*n*). Where husband and wife agree to live apart, she having separate estate, he will not be liable to a stranger advancing her money for necessaries; her acceptance of such advances amounts to a binding of her separate estate (*o*).

Separation by Act of Law.—Separation by divorce (*p*), or by decree of judicial separation, frees the husband from liability, except in the latter case where alimony has been decreed and not paid; but where alimony is regularly paid, the wife has no authority to pledge the husband's credit (*q*). But where the alimony decreed is more in amount than an agreed sum stipulated for in a prior separation, the payment of the smaller sum is a sufficient satisfaction of the husband's liability (*r*).

Where Husband is Liable.—A husband may be liable by reason of ratification, although he allows his wife a separate maintenance, and if he promises to pay the amount of a debt contracted by her he is bound by his promise, and is liable to pay the debt (*s*). The husband is liable for his wife's debts for

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(*i*) *Holt* v. *Brien*, 4 B. & Ald. 252.

(*k*) *Biffen* v. *Bignell*, 7 H. & N. 877; 31 L. J. Ex. 189.

(*l*) *Beale* v. *Arabin*, 36 L. T. 249. Where he has agreed to transfer property to trustees on behalf of his wife, he must show that the trustees have taken possession of it under the agreement; *Burrett* v. *Booty*, 8 Taunt. 343.

(*m*) *Eastland* v. *Burchell*, 3 Q. B. D. 432; 47 L. J. Q. B. 500. See also *Biffin* v. *Bignell*, *supra*.

(*n*) See *Hodgson* v. *Williamson*, 15 Ch. D. 87.

(*o*) *Mizen* v. *Pick*, 3 M. & W. 481, not following the language used by Lord Eldon in *Rawlyns* v. *Vandyke*, 3 Esp. 250; see also *Turner* v. *Winter*, Selw. N. P. 229.

(*p*) *Capel* v. *Powell*, 34 L. J. C. P. 168.

(*q*) *Hunt* v. *De Blaquiere*, 5 Bing. 553.

(*r*) *Negus* v. *Forster*, 46 L. T. 675.

(*s*) *Hornbuckle* v. *Hornbury*, 2 Stark. 177; *Harrison* v. *Hall*, 1 M. & Rob. 135.

necessaries when he has *agreed* to make his wife an allowance, and he does *not* pay it (*t*). He is also liable where, separating by mutual consent from his wife, but without an agreement as to the amount of allowance, he either does not allow her any, or only an insufficient, amount (*u*). The sufficiency or insufficiency is then a matter for the consideration of the jury. Again, he is liable where he is in default by reason of his conduct, as where he turns his wife out of doors, and she has not the physical or pecuniary means of support; for in such a case it may be inferred that she has an authority of necessity (*x*). Under such circumstances the husband is liable to refund the funeral expenses of his wife, whether incurred by an undertaker or other volunteer (*y*). He is also liable for necessaries supplied to his wife, where he unjustly expels her from under his roof (*z*), and she obtains a credit suitable to her means (*a*); or where he by his cruelty or ill-treatment compels her to leave him (*b*). The ill-treatment need not be personal violence, though she must reasonably apprehend personal violence, or be subjected to gross outrage, such as the introduction of a prostitute into the house (*c*). A well-grounded fear of being improperly detained would entitle her to leave his house (*d*). He is also liable when he has deserted her (*e*); also where after condoning her adultery and taking her back to his home he subsequently deserts her or turns her out of doors (*f*); or where after conniving at her adultery he turns her out of doors (*g*). But if a husband after turning his wife out of doors makes her a *bona fide* offer to return, and she has no well-grounded fear of personal violence, it would seem that her authority to pledge his credit is determined (*h*). Where the wife has this authority she does not derive it from her husband's will, and her husband cannot at any moment and at his own pleasure determine it so as to affect her right to be supplied with necessaries or the right of

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(*t*) *Beale* v. *Arabin* (*ubi sup.*); *Nurse* v. *Craig*, 2 N. R. B. & P. 148.
(*u*) *Hodgkinson* v. *Fletcher* (*ubi sup.*).
(*x*) *Boulton* v. *Prentice*, Selw. N. P. 233; *Manby* v. *Scott*, 1 Sid. 109. See also *Johnston* v. *Sumner*, 27 L. J. Ex. 341.
(*y*) *Ambrose* v. *Kerrison*, 20 L. J. C. P. 135.
(*z*) *Rawlyns* v. *Vandyke* (*ubi sup.*).
(*a*) *Emery* v. *Emery*, 1 Y. & J. 501.
(*b*) *Houliston* v. *Smyth*, 3 Bing. 127; *Boulton* v. *Prentice* (*ubi sup.*).
(*c*) *Houliston* v. *Smyth* (*ubi sup.*).
(*d*) *Mallelieu* v. *Lyon*, 1 F. & F. 431.
(*e*) *Jenner* v. *Morris*, 30 L. J. Ch. 361; *Deare* v. *Soutten*, L. R. 9 Eq. 151.
(*f*) *Harris* v. *Morris*, 4 Esp. 41.
(*g*) *Wilson* v. *Glossop*, 19 Q. B. D. 379; 57 L. J. Q. B. 161.
(*h*) See Lush, Husb. & W. p. 406; *James* v. *Warren*, Holt, 104.

those who have supplied them to be paid for the things so supplied (*i*). This authority does not extend to the case of a woman who has been living with a man, who is not his wife, but has been turned out of doors or deserted by him (*k*).

If the wife is living with her husband and has a separate income, she would still seem to possess the ordinary authority to pledge his credit for the supply of necessaries. If the things ordered by her were not necessaries the fact of her possessing separate income would afford an almost conclusive presumption that the contract was on her own behalf and not that of her husband (*l*).

Necessaries.—No fixed rule can be laid down as to what are and are not necessaries. "Necessaries" is a relative word, varying with the rank, profession, position, and fortune of the parties; that which might be a necessary for a peeress would be extravagant and wasteful luxury for the wife of a village apothecary (*m*). In order to protect creditors the Court will permit the test of the position which the parties have chosen to assume and parade, and not their real pecuniary means and resources, for the purpose of ascertaining whether the articles supplied are or are not necessaries. The husband is held to be the proper person to decide what station and appearance of life he should assume, and so confer upon his wife the *prima facie* authority to pledge his credit for things suitable and necessary for that station in life (*n*). Necessaries are things which cannot well be dispensed with; and, as applied to a wife, things which it is reasonable she should enjoy, and not merely articles which she is compelled to purchase (*o*). That which is a necessary at one time may not be so at another. It is, however, an elastic term, and many things are described by it which in popular language could hardly be termed necessaries, but have been brought within the category in order to further the ends of justice. Evidence will now be admitted to the effect that the wife was at the time when she ordered the goods sufficiently supplied with articles of the like nature, so that the articles supplied by the creditor were not in the category

(*i*) *Boulton* v. *Prentice* (*ubi sup.*).
(*k*) *Monro* v. *De Chemant*, 4 Camp. 215.
(*l*) See *Freestone* v. *Butcher*, 9 C. & P. 643.
(*m*) See *Lane* v. *Ironmonger*, 13 M. & W. 368; 14 L. J. Ex. 35; and *Bazeley* v. *Forder*, L. R. 3 Q. B. 559; 37 L. J. Q. B. 237.
(*n*) See *Manby* v. *Scott*, 2 Sm. L. C. 429; *Morgan* v. *Chetwynd*, 4 F. & F. 451; *Jolly* v. *Rees*, 33 L. J. C. P. 177; 15 C. B. (N.S.) 628.
(*o*) *Bazeley* v. *Forder* (*ubi sup.*).

of necessaries (*p*). When a tradesman supplies goods to a married woman, it is incumbent upon him to prove affirmatively that they fall within the category of necessaries (*q*).

The following is a short list of various things which have been held to be necessaries, for the supply of which a wife may pledge her husband's credit. The ordinary necessaries are food, drink, lodging, fuel, washing, clothing (*r*), and medical attendance where living with the husband (*s*), and when wrongfully turned out of doors by him, or where it is necessitated by his ill-treatment (*t*). So, too, suitable furniture (*u*) and repairs to the husband's house (*x*) have been treated as necessaries. The expenses of an attorney in assisting the wife to exhibit articles of the peace against her husband, even though she has a sufficient maintenance (*y*), also legal expenses incurred in defending a wife prosecuted for keeping a bawdy-house, her husband being aware of that fact, and also being personally known to her attorney (*z*). Costs in a petition for divorce which the wife was compelled to bring (*a*); the expenses incurred in a genuine and proper suit for judicial separation (*b*); also legal expenses incurred by a deserted wife—(i) preliminary and incidental to a suit for restitution of conjugal rights; (ii) in obtaining counsel's opinion as to the effect of an ante-nuptial agreement for a settlement; (iii) in obtaining professional advice as to the proper mode of dealing with creditors who were pressing for payment for goods supplied her since desertion; (iv) and in preventing a distress in the house occupied by her for arrears of rent owed by her husband (*c*). "Extra costs," or those not allowed on taxation between party and party, incurred in divorce proceedings reasonably undertaken by the wife, can be recovered as necessaries (*d*). The onus of proof that the proceedings were

(*p*) See *Baines* v. *Toye*, 13 Q. B. D. 410; 53 L. J. Q. B. 567; this was a case of alleged necessaries supplied to an infant. See the principle enunciated in 56 & 57 Vict. c. 71, s. 2 (Sale of Goods Act, 1893).

(*q*) *Phillipson* v. *Hayter*, L. R. 6 C. P. 38; 40 L. J. C. P. 14.

(*r*) *Wallis* v. *Biddick*, 22 W. R. 76; *Miss Gray, Lim.* v. *Cathcart* (*Earl*), 38 T. L. R. 562; *Callot* v. *Nash*, 39 T. L. R. 292.

(*s*) *Harris* v. *Lee*, 1 P. Wms. 438.

(*t*) *Stocken* v. *Pattrick*, 29 L. T. 507; *Foristall* v. *Lawson*, 34 L. T. 903.

(*u*) *Hunt* v. *De Blaquiere*, 5 Bing. 550.

(*x*) See *Richardson* v. *Dubois*, L. R. 5 Q. B. 51; 39 L. J. Q. B. 69.

(*y*) *Turner* v. *Rookes*, 10 A. & E. 47; 2 P. & D. 240; see also *Shepherd* v. *Mackoul*, 3 Camp. 326. But see *Re Wingfield and Blew* (*Solicitors*), [1904] 2 Ch. 665; 73 L. J. Ch. 797.

(*z*) *Shepherd* v. *Mackoul* (*ubi sup.*).

(*a*) *Rice* v. *Shepherd*, 6 L. T. 432; 2 C. B. (N.S.) 322; *Wilson* v. *Ford*, L. R. 3 Ex. 63; 37 L. J. Ex. 60; *Martin & Co.* v. *Colmer*, 48 L. Jo. 444.

(*b*) *Brown* v. *Ackroyd*, 5 E. & B. 819. (*c*) *Wilson* v. *Ford* (*ubi sup.*).

(*d*) *Ottaway* v. *Hamilton*, 3 C. P. D. 393; 47 L. J. C. P. 424.

necessary is on the solicitor seeking to recover them (*e*). Such costs as the above will still clearly be recoverable in the case of a wife married before the Married Women's Property Act, 1882, came into force, and, it would seem, where she was married after it became law, but does not possess any property of her own or any free separate property. But it has been doubted whether the wife's solicitor can recover such costs where she was married after the Act came into force, and had free separate property in respect of which she could validly contract (*f*). If the wife is the guilty party and has separate property she ought clearly to be made liable for costs; the authority to pledge her husband's credit in respect of costs of divorce proceedings is revoked by adultery, and in a common law action the question must be considered apart from the practice of the Divorce Court (*g*). The husband's credit may be pledged for costs reasonably incurred in instituting divorce proceedings. His liability is not dependent upon the result of the proceedings, but on whether there were reasonable grounds for instituting them (*h*). Solicitors in a suit for judicial separation, having obtained judgment for their costs against the wife, cannot afterwards obtain judgment against the husband (*i*). In divorce proceedings costs of the wife payable by the husband are not limited to those paid into Court, or secured by the husband for that purpose (*k*).

Not Necessaries.—The following have been held not to be necessaries. Articles of mere luxury and ornament, such as articles of jewelry not suited to the position of the wife (*l*). The expenses of an indictment preferred by the wife against her husband for assault (*m*). The principle upon which these expenses are disallowed and treated as unnecessary, but those incurred in exhibiting articles of the peace against the husband are allowed (*n*), is that in the former instance the wife seeks to *punish* her husband, in the latter she only *claims protection* against him. The counterpart of a deed of separa-

(*e*) *Taylor* v. *Hailstone*, 52 L. J. Q. B. 101.
(*f*) *Otway* v. *Otway*, 13 P. D. 141; 57 L. J. P. 81; *Ash* v. *Ash*, [1893] P. 222; 62 L. J. P. 97.
(*g*) *Durnford* v. *Baker*, [1924] 2 K. B. 587; 93 L. J. K. B. 866.
(*h*) *M. Abrahams, Sons & Co.* v. *Buckley*, [1924] 1 K. B. 903; 93 L. J. K. B. 603.
(*i*) *Sullivan* v. *Sullivan*, 45 Ir. L. T. 198.
(*k*) *Robertson* v. *Robertson*, 6 P. D. 119.
(*l*) *Montague* v. *Benedict*, 3 B. & C. 631.
(*m*) *Grindell* v. *Godmond*, 5 A. & E. 755.
(*n*) *Turner* v. *Rookes*, 10 A. & E. 47; 2 P. & D. 240.

tion made for the wife's trustee (*o*); expenses incurred by the wife justifiably living apart from her husband in resisting his endeavours to recover the custody of their child over seven years of age living with her (*p*). In regard to a solicitor's costs incurred by a wife in endeavouring to procure a judicial separation, it has been held that they cannot be recovered as "necessaries" against the husband unless the necessity for such proceedings can be made out in point of fact; and it was not enough that the solicitor had reasonable grounds for supposing upon her statements that the proceedings ought to be taken (*q*). It was pointed out, however, later by McCardie, J., that this ruling of Mathew, J., was *obiter dictum*, as that learned judge had proceeded to find that the solicitor had no reasonable ground for believing that the wife was entitled to a judicial separation, and the *dictum* was not followed. If the solicitor acts on reasonable grounds, makes adequate inquiries, and shows proper diligence and care, he is entitled to recover (*r*).

Among the items not considered as included among "necessaries" in section 26 of the Matrimonial Causes Act, 1857 (*s*), but recoverable by the wife where there had been a decree of judicial separation whether under that Act or the Summary Jurisdiction (Married Women) Act, 1895 (*t*), and the decreed alimony had been punctually paid by the husband, were her costs in proceedings for dissolution of marriage subsequent to the separation, and she was deemed able to pledge his credit for such notwithstanding her legal position as a *feme sole*. But this section has been held to prevent a wife recovering such costs against her husband where she has been judicially separated and he has kept up the payment of the decreed alimony (*u*). On the other hand, it has been held that the practice of the Divorce Court, which is based on the discretionary functions of the judge to direct a husband whose wife has been judicially separated from him to find security for such costs as may be considered necessary to enable the wife to bring a suit for dissolution of marriage, still remains in force (*x*).

(*o*) *Ladd* v. *Lynn*, 2 M. & W. 265.
(*p*) *Mecredy* v. *Taylor*, 7 Ir. Rep. C. L. 256.
(*q*) *Taylor* v. *Hailstone*, 52 L. J. Q. B. 101.
(*r*) *M. Abrahams, Sons & Co.* v. *Buckley*, [1924] 1 K. B. 903; 93 L. J. K. B. 603.
(*s*) 20 & 21 Vict. c. 85.
(*t*) 58 & 59 Vict. c. 39.
(*u*) *Re Wingfield and Blew (Solicitors)*, [1904] 2 Ch. 665; 73 L. J. Ch. 797.
(*x*) See *Sheppard* v. *Sheppard*, [1905] P. 185; 74 L. J. P. 102.

The capacity and authority of a married woman to pledge her husband's credit for necessaries when living apart from him has not been altered by the Married Women's Property Acts of 1882 and 1893, except that where she is possessed of separate property of her own it will be easily presumed against her that she intended to contract in respect of it (*y*). If, therefore, a married woman living apart from her husband, whether voluntarily or by reason of his wrongful conduct, has sufficient separate estate to maintain herself, whether derived from settled property or her own exertions, she will not have any authority of necessity to pledge his credit; and it has been decided that if she lives apart from him through his wrongful conduct, but has obtained an order protecting her earnings, she possesses no such authority (*z*).

SECTION 4.

Incidents of Contractual Power.

Separate Trading.—Owing to her contractual disability at common law a married woman could not, as a rule, trade apart from her husband except as his agent; there were, however, certain exceptions to this rule: thus, where her husband was civilly dead, as when undergoing a sentence of transportation for felony (*a*); and by the custom of the City of London she might carry on a trade within the City as a *feme sole* (*b*). Under the Divorce Act, 1857 (*c*), a decree of judicial separation entitled her to carry on a separate trade as a *feme sole*; so, too, an order protecting her earnings under the Divorce Acts, 1857 (*d*) and 1858 (*e*), and the Matrimonial Causes Act, 1878 (*f*). The Married Women's Property Act, 1870 (*g*), increased the protection of her separate trade earnings; and the Married Women's Property Act, 1882 (*h*), entitles her to hold as her separate property everything acquired by her trading carried on separately from her husband.

(*y*) See observations in *Otway* v. *Otway*, 13 P. D. 141; 57 L. J. P. 81, and *Ash* v. *Ash*, [1893] P. 231; 62 L. J. P. 97.
(*z*) *Tempany* v. *Hakewill*, 1 F. & F. 438.
(*a*) *Ex parte Franks*, 7 Bing. 762.
(*b*) *Ex parte Charrington*, 1 Atk. 206; *Lavie* v. *Phillips*, 3 Burr. 1782.
(*c*) 20 & 21 Vict. c. 85, ss. 25, 26.
(*d*) *Ibid.* s. 21.
(*e*) 21 & 22 Vict. c. 108, s. 6.
(*f*) 41 Vict. c. 19, s. 4. This was repealed by 58 & 59 Vict. c. 39, but practically re-enacted by it.
(*g*) 33 & 34 Vict. c. 93, s. 1.
(*h*) 45 & 46 Vict. c. 75, s. 2.

Separate trading does not necessarily imply that the wife is living apart from the husband, but that he does not intermeddle with her business (*i*). A woman may carry on a business in partnership with her husband, or with partners other than her husband (*k*). Whether she carries on the trade apart from her husband, or really under his direction, is a question to be determined in each case by the evidence (*l*). Where the husband is really the master of the business, holds himself out as the proprietor, and renders himself liable as principal to third parties, in such a case the wife's trading could not be said to be separate (*m*).

Bankruptcy.—Although by virtue of the above statutes a married woman had considerable power over the disposition of her property, and greater facilities for acquiring property, it was not until the Married Women's Property Act, 1882, that she was rendered liable to the bankruptcy law in respect of her contracts. Though formerly she could not be made a bankrupt, yet an order under the Debtor's Act (*n*) might have been made on her (though her property was settled to her separate use without power of anticipation) for payment of a judgment debt by instalments without any proof of her means (*o*). By the Bankruptcy Act, 1914 (*p*), s. 125, it is provided that "every married woman who carries on a trade whether separately from her husband or not shall be subject to the bankruptcy laws as if she were a *feme sole*."

But it is only in respect of her trading that she is liable to the bankruptcy law, and if she does not carry on a trade she cannot be made a bankrupt (*q*). She can be made bankrupt in respect of unpaid trade debts, though she has ceased to carry on her late trade (*r*); either on the ground that having undischarged trade debts at the date of the petition was evidence from which it ought to be inferred she was still carrying on her late trade, or that having once carried on a trade she continued, even after she had ceased to do so, to be subject to the bank-

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(*i*) *Ashworth* v. *Outram*, 5 Ch. D. 923; 46 L. J. Ch. 687.
(*k*) See *Eddowes* v. *Argentine Loan and Mercantile Agency*, 63 L. T. 364.
(*l*) *Ashworth* v. *Outram* (*ubi sup.*). See *Lovell* v. *Newton*, 4 C. P. D. 7; and *In re Whittaker*, *Whittaker* v. *Whittaker*, 21 Ch. D. 657; 51 L. J. Ch. 737.
(*m*) *Laporte* v. *Costick*, 23 W. R. 133.
(*n*) 32 & 33 Vict. c. 62.
(*o*) *Dillon* v. *Cunningham*, L. R. 8 Ex. 23; 42 L. J. Ex. 11.
(*p*) 4 & 5 Geo. V. c. 59.
(*q*) *Re Gardiner*, *Ex parte Coulson*, 20 Q. B. D. 249; 57 L. J. Q. B. 149.
(*r*) *Re Dagnall*, *Ex parte Soan and Morley*, [1896] 2 Q. B. 407; 65 L. J. Q. B. 666; *Re Worsley*, [1901] 1 K. B. 309; 70 L. J. K. B. 93.

ruptcy laws in respect of the debts incurred by her during the period of her trading.

Since a married woman trader can be made a bankrupt, and section 19 of the Married Women's Property Act, 1882, provides that "no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors," it follows that any settlement of her property by a trader either before or after marriage would contravene the provisions of section 42 of the Bankruptcy Act, 1914 (*s*), and be void against her trustee in bankruptcy. But where the restraint is imposed by a stranger on his gift, it will have effect given to it by removing the property so affected from out of the reach of her creditors, though she be a trader (*t*), but the Court, having regard to the means of subsistence available for her and her children, may order the whole or some part of the income during a time to be fixed to be distributed amongst the creditors (*u*). Any attempt to restrain herself from anticipating her property will be ineffectual. A married woman who trades and has been adjudicated a bankrupt cannot be compelled to execute a deed exercising a general power of appointment by deed or will in favour of her trustee in bankruptcy, for a general power of appointment by deed or will of which she is the donee, but which has not been exercised by her, is not separate property within the meaning of section 1, sub-section 5 of the Married Women's Property Act, 1882; though if she were a *feme sole* it might become "property" under section 38 (a) of the Bankruptcy Act, 1914. Her life interest, however, in property which is settled on her without restraint on anticipation passes to her trustee, as the claim of the trustee in such a case is not an interfering with or affecting the settlement within the meaning of section 19 of the Married Women's Property Act, 1882 (*x*)

The distinction between traders and non-traders has been abolished among men, and there does not, in the face of the considerable alteration in the status of the married woman effected by the Act of 1882, seem to be any valid ground for

(*s*) 4 & 5 Geo. V. c. 59.

(*t*) See *Pelton (Bros.)* v. *Harrison*, [1891] 2 Q. B. 422; 60 L. J. Q. B. 742. A contrary view to this has been taken by Cozens-Hardy, J., in *Re Wheeler's Settlement Trusts*, *Briggs* v. *Ryan*, [1899] 2 Ch. 717; 68 L. J. Ch. 663. But this latter decision does not seem to be in consonance with the authorities.

(*u*) Bankruptcy Act, 1914, s. 52.

(*x*) *Re Armstrong*, *Ex parte Boyd*, 21 Q. B. D. 264; 57 L. J. Q. B. 553.

preserving it in the case of married women. The old common law theory of the unity of husband and wife is a thing of the past; but the equity creature and fiction—the separate estate—is still largely recognized.

Policies of Insurance. Before the Married Women's Property Act, 1870, but few policies of insurance could have been effected by married women on their own lives or those of their husbands, except as agents for their husbands, because of their incapacity to make binding contracts. If a wife insured her own life with the consent of her husband, the right to the policy was a chose in action of the wife, which became her husband's property (*y*).

Insurable Interest. In order to effect a valid insurance upon the life of another, the insurer must have some interest in the life of the insured (*z*). A married woman was presumed to have an insurable interest in her husband's life (*a*); while the husband, on the contrary, was bound to show that he had such insurable interest (*b*). The Married Women's Property Acts, 1870 (*c*) and 1882 (*d*), while giving the husband the larger power of effecting a policy for the separate use of his wife and the benefit of his children, enabled him only to do so on his own life. A husband may effect a policy of insurance on his own life for the benefit of (i) his wife; (ii) or of his children; (iii) or of his wife and children; (iv) or any of them (*e*). The husband had this power under section 10 of the Married Women's Property Act, 1870, and the terms of the two sections on this point are substantially the same.

Since husband and wife are now practically placed on the like footing as regards their mutual rights in each other's property, the capacity for insuring his wife's life ought by analogy to be extended to the husband. This view has now authority to support it. It is unnecessary to give affirmative evidence of a pecuniary interest in the life of the wife, the interest to the extent of the policy money will be presumed (*f*).

Under the Act of 1882 (*g*), a married woman may effect a

(*y*) See *Re Watson, Ex parte Merrett*, 7 Morr. Bank. Rep. 65.
(*z*) 14 Geo. III. c. 48.
(*a*) *Reed* v. *The Exchange Association Co.*, Peake, Add. Cas. 70.
(*b*) *Hanson* v. *Blackwell*, 1 Ha. 434.
(*c*) 33 & 34 Vict. c. 93, s. 10.
(*d*) 45 & 46 Vict. c. 75, s. 11.
(*e*) *Ibid.*
(*f*) *Griffiths* v. *Fleming*, [1909] 1 K. B. 805; 78 L. J. K. B. 567.
(*g*) *Ibid.*

policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall inure accordingly. She may effect a policy (i) on her own life, or on her husband's, for her separate use; (ii) or on her own life, and expressed to be for the benefit of her (a) husband, or (b) her children, or (c) husband and children, or (d) any of them. But she cannot insure her husband's life in his favour, or in that of their children. Where a wife paid premiums without any request by her husband or the trustees of the settlement on policies settled in trust for her, the husband not having means, the payments were held to be voluntary and the wife had no right of recoupment (*h*).

Declaration of Trust.—The effect of taking out a policy which is expressed to be for the benefit of the parties therein named is to constitute a declaration of an executed trust on behalf of such parties, who will take according to their interests therein expressed. Where a wife effected a policy on her own life for the benefit of her husband, the sum to be paid to the husband on the death of the wife, and the premiums were paid by the husband, who died first, his executors took (*i*); but where the policy effected by the one spouse, whether under the Act of 1870 or of 1882, is declared to be for the benefit of the other spouse and the children, but the interests of the respective parties are not otherwise declared, it has been held that on the death of the settlor the surviving spouse and children take as joint-tenants (*k*); and this is so where the spouse of the insuring spouse has died, and the latter has married again and leaves a widow or widower surviving and a second family (*l*). But where a man has effected a policy on his own life under section 10 of the Married Women's Property Act, 1870, "for the

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(*h*) *Re Jones' Settlement, Stunt* v. *Jones*, [1915] 1 Ch. 373. As to right of wife to recover premiums paid during bankruptcy of husband, see *Re Tylor, Ex parte Official Receiver*, [1907] 1 K. B. 865.

(*i*) *Prescott* v. *Prescott*, [1906] 1 Ir. R. 155.

(*k*) *Re Seyton, Seyton* v. *Satterthwaite*, 34 Ch. D. 511; 56 L. J. Ch. 775; *Re Davies' Policy Trusts*, [1892] 1 Ch. 90; 61 L. J. Ch. 650. In *Re Seyton*, North, J. (following the decision of Hatherley, L.C., in *Newill* v. *Newill*, L. R. 7 Ch. 253; 45 L. J. Ch. 432), dissented from the ruling of Chitty, J., in *Re Adams' Policy Trusts*, 23 Ch. D. 525; 52 L. J. Ch. 642, in which the learned judge expressed his opinion that the surviving spouse would take a life interest in the policy fund, and the children a joint-tenancy in remainder. He also explained the judgment of Malins, V.-C., on the second application to the Court in the case of *Re Mellor's Policy Trusts* (7 Ch. D. 200), who had held that such words in a policy amounted to a settlement on the surviving spouse and children by creating vested interests as joint-tenants in such of them as were living at the settlor's death. In *Re Davies' Policy Trusts*, Chitty, J., followed the decision in *Re Seyton*.

(*l*) *Re Browne's Policy, Browne* v. *Browne*, [1903] 1 Ch. 188; 72 L. J. Ch. 85; *Re Parker's Policies*, [1906] 1 Ch. 526; 75 L. J. Ch. 297.

benefit of his wife, or if she be dead, between his children in equal proportions," and that wife die and he marries again and has a family by the second wife; on his death the children of the two marriages take as joint-tenants, but the second wife is not entitled to participate in the moneys of the policy (*m*). If a husband pay the premiums on a policy effected by his wife, he or his estate has no lien on the capital sum insured to the amount advanced by him, unless by virtue of a contract with his wife as beneficial owner of the policy, or he had paid them under a mistake as to his title to the policy (*n*).

The trust created is a trust in favour of the objects named in the policy, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts, and a policy cannot be surrendered so long as any part of the trust is unperformed. But if the trust cannot be performed because there is no object for it to operate upon or as being contrary to public policy, then a resulting trust is created in favour of the settlor's estate (*o*). Thus, where a husband who effected an insurance policy on his own life for the benefit of his wife, was murdered by her, the trust created by the policy in her favour under this section having become incapable of being performed by reason of her crime, it was held that the insurance money formed part of the estate of the insured (*p*). But as between the legal representatives of the settlor and the insurers no question of public policy arise (*q*). If it is proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, the creditors will be entitled to receive out of the moneys payable under the policy a sum equal to the premiums so paid (*r*); that is to say, the trustee in bankruptcy of the settlor will have no interest in the policy beyond the amount of the premiums fraudulently paid. The payment of a premium to keep up a policy of insurance is not a "settlement" within section 42 of the Bankruptcy Act, 1914; so that where a husband by a post-nuptial settlement assigned a policy of insurance on his own life for his wife and

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(*m*) *Re Griffiths' Policy*, [1903] 1 Ch. 739; 72 L. J. Ch. 330. This was a decision on the construction of the particular policy and not on the statute.

(*n*) See *Re Leslie, Leslie* v. *French*, 48 L. T. 564.

(*o*) *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q. B. 147; 61 L. J. Q. B. 128.

(*p*) *Ibid*

(*q*) *Ibid.*

(*r*) Sect. 11. See *Holt* v. *Everall*, 2 Ch. D. 266; 45 L. J. Ch. 433.

children, and voluntarily kept it up by paying the premiums, and became bankrupt and died, his trustee in bankruptcy was held not entitled to any part of the policy moneys (*s*).

Appointment of Trustee.—Such a policy effected under section 10 of the Married Women's Property Act, 1870, by a husband who dies after the Married Women's Property Act, 1882, has come into force, does not vest in his personal representatives in trust for the beneficiaries, but a trustee for the purposes of the Act must be appointed under section 10; in other words, the provisions of section 11 of the Married Women's Property Act, 1882, are not retrospective (*t*). In such a case the petition in the matter is rightly entitled only "In the Matter of the Married Women's Property Act, 1870" (*u*).

The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her personal legal representatives in trust for the purposes aforesaid; but the nomination of a payee does not constitute the payee a trustee (*x*). If at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees, or a new trustee or new trustees may be appointed by any Court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or part (*y*). This latter provision, which is new, would seem to enable the trustee to realize, if necessary, the surrender value of the policy, which formerly he could not do. The application

(*s*) *Re Harrison and Ingram, Ex parte Whinney*, [1900] 2 Q. B. 710; 69 L. J. Q. B. 942.

(*t*) *Re Turnbull, Turnbull* v. *Turnbull*, [1897] 2 Ch. 415; 66 L. J. Ch. 719.

(*u*) See *Re Kuyper's Policy Trusts*, [1899] 1 Ch. 38; 68 L. J. Ch. 10.

(*x*) See Fry, L.J., in *Cleaver* v. *Mutual Reserve Fund Life Association* (*ubi sup.*).

(*y*) Sect. 11.

to the Court for the appointment of a trustee should be made by petition (*z*), or, if under the provisions of the Conveyancing Act, 1881, by summons at chambers. Where the interests of infants are involved and the appointment of trustees is necessary, the Court acting under its general jurisdiction will not appoint less than two trustees (*a*).

Capacity to be a Partner.—The capacity or incapacity of a married woman to be a partner is only one branch out of many of the main question whether she had or had not the capacity to contract. At common law a married woman not having any contractual power of her own could not be a partner, except as her husband's agent; and if she were *de facto* a partner, it was her husband and not herself who in law was treated as the real partner (*b*). But in equity a married woman who was possessed of separate estate, and was trading in or belonging to a partnership, was treated as a partner, and so far as her separate estate was concerned was liable for the partnership debts (*c*).

Under the Married Women's Property Act, 1882, her capacity for entering into partnership, not only with third persons, but with her husband is recognized, for all her property of whatsoever description is her separate property, which, unless she is legally restrained from dealing with it, will be answerable for any debts she may contract. If a married woman was under the former law a member of or partner in a trading firm, she was presumed to have separate property necessary to give validity to her contracts (*d*). But since the Married Women's Property Act, 1893 (*e*), it is immaterial whether she actually possesses property of her own or not; for under that Act the existence of separate property is not a condition precedent to the validity of her contracts.

To be a Shareholder.—As an incident of her capacity to be a partner, a married woman was capable of being a shareholder in a corporation or company, if the charter of incorporation or deed of settlement did not exclude her; and in equity

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(*z*) See *Re Mellor's Policy Trusts*, 6 Ch. D. 127; 7 Ch. D. 200. Where there is no trustee of a policy effected under the Act of 1870, the petition for the appointment of such trustee should be entitled both in the matter of the Trustee Act and in the matter of the Act of 1882. *Re Soutar's Policy Trusts*, 26 Ch. D. 236; 32 W. R. 701. But see *Re Adams' Policy Trusts*, 23 Ch. D. 525; 52 L. J. Ch. 642; and *Re Turnbull, Turnbull* v. *Turnbull*, [1897] 2 Ch. 415; 66 L. J. Ch. 719.

(*a*) *Re Howson's Policy Trusts*, W. N. (1885) 213; *Schultze* v. *Schultze*, 56 L. J. Ch. 356.

(*b*) *Burlinson's Case*, 3 De G. M. & G. 18.

(*c*) Lind. Part. 6; *Mrs. Mathewman's Case*, L. R. 3 Eq. 781; 36 L. J. Ch. 90.

(*d*) *Eddowes* v. *Argentine Loan and Mercantile Agency Co.*, 62 L. T. 602.

(*e*) 56 & 57 Vict. c. 63.

she could contract to take shares so as to bind her separate property (*f*). Under the Married Women's Property Act, 1870 (*g*), a married woman who was entitled to fully paid-up shares to her separate use, could compel the company by *mandamus* to register her legal title in respect of them (*h*). But under that Act the shares held by a married woman must have been fully paid up, without any liability attaching to them (*i*). By virtue of the Act of 1882 (*k*) she can be a shareholder, whether solely or jointly, of partly paid-up as well as fully paid-up shares, and she can compel registration of either class of investments (*l*). But even now she cannot compel any corporation or joint-stock company to admit her as a holder of any shares or stock to which any liability may be incident, contrary to the provisions of any Act of Parliament, charter, by-law, articles of association, or deed of settlement regulating such corporation or company (*m*). Formerly, where her shares were not held to her separate use, she could not vote in respect of them; but where they were held to her separate use, she was entitled to do so, and her husband's disapproval did not render her vote invalid (*n*). It is now clear that a married woman will be entitled to vote in respect of shares which she holds independently of her husband, who will in no way be able to control her right.

To be a Trustee.—A married woman under the old state of the law, was not disqualified from being appointed a trustee; but her appointment was attended by many inconveniences, and there were several reasons why she should not be chosen. The wife's personality was merged in that of her husband, and her will was not always her own, and when a trust was confided to a *feme covert*, the husband, who was answerable for her acts, exercised no little influence. Indeed, as he was in general liable for her breaches of trust, whether committed before or after marriage (*o*), he was bound for his own protection to look to the manner in which she discharged the office; accordingly, she was not allowed to execute the trust

(*f*) *Mrs. Mathewman's Case* (*ubi sup.*).
(*g*) 33 & 34 Vict. c. 93.
(*h*) *Reg.* v. *Carnatic Railway Co.*, L. R. 8 Q. B. 299; 42 L. J. Q. B. 169.
(*i*) Sects. 4, 5.
(*k*) 45 & 46 Vict. c. 75, ss. 6, 7, 8.
(*l*) *Ibid.* ss. 7, 12.
(*m*) *Ibid.* s. 7.
(*n*) Lind. Comp. 310.
(*o*) *Palmer* v. *Wakefield*, 3 Beav. 227.

without his concurrence (*p*). A disclaimer, therefore, by the husband operated as a disclaimer of the trust by the wife. Again, a married woman could not execute the proper assurances for conveying the legal interest of the trust property (if realty), without obtaining the consent of her husband, and going through the expensive and onerous process necessitated by the Fines and Recoveries Act (*q*); she could not by herself convey real estate devised to her merely in trust for sale (*r*). But if she obtained an order from the Court, under section 91 of the last Act, dispensing with her husband's concurrence, she could execute a conveyance of the trust property without acknowledging the deed (*s*). So, too, the payment of the purchase-money required the joint receipt of husband and wife (*t*). If a married woman obtained a protection order, she was enabled by section 7 of 21 & 22 Vict. c. 108 to exercise the office of trustee as though she were single. But now she may be appointed sole trustee, or jointly with others, and can accept the trust without first obtaining the consent of her husband (*u*), and she has all the rights, duties, and liabilities of an ordinary trustee (*x*), and in consequence her husband is in no way liable for her breaches of trust, if he do not intermeddle with the trust (*y*). She can now receive or transfer various classes of property, including (1) deposits in the Post Office, or other savings bank, or any bank; (2) annuities granted by the Commissioners for the Reduction of the National Debt, or any other person; (3) investments in the public stocks and funds; (4) investments transferable in the books of a bank; (5) any interest in a company, corporation, or public body; (6) any interest in any society, to which she is solely or jointly entitled as trustee, without the concurrence of her husband (*z*), which before the passing of this Act she could not do (*a*). But if the shares, stock, or other investment were standing or placed in the joint names of herself and her husband, she would not acquire the right to deal with them without his concurrence (*b*). Where, then, personal property is invested in the name of a married woman,

(*p*) Lewin on Trusts, p. 33, and the cases there cited.
(*q*) 3 & 4 Wm. IV. c. 74.
(*r*) *Avery* v. *Griffin*, L. R. 6 Eq. 606.
(*s*) *Goodchild* v. *Dougal*, 3 Ch. D. 650.
(*t*) See *Drummond* v. *Tracy*, Johns. 611.
(*u*) 45 & 46 Vict. c. 75, ss. 1 (sub-s. 2), 8, and 24, which latter provides that the word contract in this Act shall include the acceptance of any trust.
(*x*) *Ibid.* s. 18. (*y*) *Ibid.* s. 24. (*z*) Sect. 18.
(*a*) *Howard* v. *The Bank of England*, L. R. 19 Eq. 295; 44 L. J. Ch. 329.
(*b*) Effect of sections 6-9 of 45 & 46 Vict. c. 75.

solely or jointly with another, not her husband, she acquires the legal estate in it, and can, so far as her husband is concerned, dispose of it as a *feme sole* without his concurrence.

Where a married woman was a "bare trustee" (*c*) of freehold or copyhold land she might convey or surrender the same as if she were a *feme sole* (*d*), that is, without the concurrence of her husband, or acknowledgment under the Fines and Recoveries Act, and she was entitled to do so even where she had a beneficial interest in the proceeds of the sale (*e*).

A doubt arose on the language of section 18 of the Married Women's Property Act, 1882, which gave a married woman trustee power to transfer certain specified descriptions of personal property without her husband's intervention as if she were a *feme sole*, whether if a married woman was neither beneficially entitled to real estate for her separate use nor a bare trustee of it, her husband's concurrence in the transfer and her acknowledgment under the Fines and Recoveries Act were still requisite. It was decided that a married woman trustee of real estate with an active duty to perform in respect of the trust, such as a trust for sale, could not convey the legal estate without her husband's concurrence and a deed acknowledged under the Fines and Recoveries Act (*f*). Where, however, she was mortgagee of land conveyed to her to secure an advance made by her, she could convey the legal fee without the concurrence of her husband or going through the formalities required by the Fines and Recoveries Act (*g*), and it made no difference that she was mortgagee with another on a joint account (*h*).

Under Law of Property Act, 1925.—By the Law of Property Act, 1925 (*i*), a married woman may acquire or dispose of any interest in any property, whether real or personal, as a trustee or personal representative, in like manner as a *feme sole*; and no such property shall vest or be deemed to have vested in the husband

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(*c*) For what is a "bare trustee" see *Christie* v. *Ovington*, 1 Ch. D. 279; *Lysaght* v. *Edwards*, 2 Ch. D. 409; 45 L. J. Ch. 554; *Morgan* v. *Swansea Urban Sanitary Authority*, 9 Ch. D. 582.

(*d*) 56 & 57 Vict. c. 53, s. 16.

(*e*) *Re Docwra, Docwra* v. *Faith*, 29 Ch. D. 693; 54 L. J. Ch. 1121.

(*f*) *Re Harkness and Allsopp's Contract*, [1896] 2 Ch. 358; 65 L. J. Ch. 726. The *ratio decidendi* of this case was that the Legislature in section 18 specifically limited the power of a married woman trustee to transfer property as a *feme sole* to the particular species of property enumerated in it. See, however, Kekewich, J., in *Re Brooke and Fremlin's Contract*, [1898] 1 Ch. 647; 67 L. J. Ch. 272.

(*g*) *Re Brooke and Fremlin's Contract* (*ubi sup.*); *Re Howgate and Osborne's Contract*, [1902] 1 Ch. 451; 71 L. J. Ch. 279.

(*h*) *Re West and Hardy's Contract*, [1904] 1 Ch. 145; 73 L. J. Ch. 91.

(*i*) 15 Geo. V. c. 20, s 170.

by reason of acquisition by the wife. This section validates acquisitions and dispositions made after December 31, 1882.

Breaches of Trust.—A married woman is now solely liable to the extent of her separate property for the breaches of trust committed by her during coverture, whether she has accepted the office of trustee before or after marriage, unless her husband has intermeddled with the trust, in which case he becomes jointly liable with her (*k*). On the death of the married woman her separate estate will continue to be responsible for her breaches of trust.

Capacity to be Executrix or Administratrix. It has been long recognized that a married woman had the capacity to be appointed and to take upon herself the office of executrix or administratrix. The assent of the husband, however, was necessary to validate the gifts and grants of a *feme covert* executrix or administratrix, for they might have tended to his prejudice, and without his assent her disposition of the goods of the deceased was void (*l*).

The Married Women's Property Act, 1882, by section 1, sub-section 2, enacts that "a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any *contract*, and of suing and being sued, either in contract, or in tort, or otherwise, in all respects as if she were a *feme sole*." Section 18: "A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person . . . may sue or be sued and may transfer or join in transferring" the various classes of property mentioned in the section as if she was a *feme sole*. Section 24: "The word 'contract' in this Act shall include the acceptance of . . . the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any devastavit (*m*) committed by any

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(*k*) 45 & 46 Vict. c. 75, s. 24.

(*l*) *Derbishire* v. *Home*, 5 De G. & Sm. 702, in which case an assignment by an administratrix who was married to an infant was held a nullity. *Pemberton* v. *Chapman*, 7 El. & B. 210; *S.C.*, in error El. Bl. & El. 1056, held that payment by a debtor of a testator and delivery to a *feme covert* executrix were valid against her co-executor, where the payment and delivery was made *bona fide* at the request of the executrix, without knowledge by the party paying and delivering of the dissent of the husband, though with knowledge that she was a *feme covert*.

(*m*) A "devastavit" has been defined as a mismanagement of the estate and effects of the deceased, in squandering and misapplying the assets contrary to the duty imposed on them, for which executors or administrators shall answer out of their own pockets, as far as they had, or might have had, assets of the deceased. Bac. Abr. Exors. L. 1

married woman being . . executrix or administratrix either before or after her marriage, and her husband shall not be liable to such liabilities unless he has acted or intermeddled in the . . . administration." The joint effect of these sections is to enable a married woman to accept the office of executrix or administratrix without the consent of her husband; she can now, apart from her husband, take out letters of probate, obtain a grant of letters of administration, and execute the administration bond (*n*). Her husband need not be joined with her in any suit, nor will she be required to give security for costs in a suit to which she is party. The husband has no longer the right of withholding his consent to his wife's accepting the office, or of practically compelling her to assume it, or of interfering with the administration of the effects of the deceased person whom she represents. Thus, if she refuse to take upon herself the office, her husband will not be permitted to take out letters of administration in her stead (*o*), or accept the office in her name. The wife is in the position of a single woman so far as concerns the administration of the deceased's effects, and is in no wise affected by her coverture. In return for being deprived of the control of his wife's administration, he is freed from liability for her devastavits, whether committed before or during coverture; her acts in the matter are to him as the acts of a stranger; but if he interfere his liability will be proportionate to his interference. The joint and several liability of husband and wife for their devastavits has been discussed elsewhere (*p*).

Section 5.

Liability in Respect of Contracts.

It now remains to be discussed of what nature is the liability of married women on their contracts. Is the liability personal or proprietary, that is, one solely confined to such separate property as she has full control over? It has been authoritatively decided that the liability of a married woman is not personal but proprietary (*q*). In equity it was only her free separate estate

(*n*) *In the Goods of Ayres*, S. P. D. 168; 52 L. J. P. 90.
(*o*) See *Haynes* v. *Matthews*, 34 L. T. (o.s.) 60.
(*p*) *Ante*, chap. xi., pp. 257 *et seq.*
(*q*) *Scott* v. *Morley*, 20 Q. B. D. 120; 57 L. J. Q. B. 43. In this case the Court of Appeal settled the form of the judgment which ought to be used in the case of a married woman. "It is adjudged that the plaintiff do recover £ and costs (to be taxed) against the defendant (the married woman), such sum and costs to be payable out of her separate property, as hereinafter mentioned, and not

that could be reached to satisfy her creditor's claim (*r*). "Proprietary liability . . . is only a short and compendious way of stating the proposition that a judgment obtained against a married woman must be executed against her property and not against her person. Such a judgment cannot make her liable to penal consequences, nor can it subject her to the operation of the bankruptcy laws, unless indeed, she be carrying on a trade . . . and be possessed of separate property; nor can any order to send her to prison be made upon it" (*s*).

Under the Married Women's Property Act, 1882, which materially increased her liability for her contracts and engagements in respect of her separate property, her liability is yet limited to the extent of her free separate estate (*t*); that is to say, neither in equity was she deemed, nor under present statutory provisions is she deemed, to put herself forward as personally liable, but only her separate property. From the above state of the law flow the following results: A married woman cannot be committed to prison on a judgment summons under section 5 of the Debtors Act, 1869, for default in paying a sum of money for which judgment has been recovered against her, both in cases where her separate property is subject to a restraint upon anticipation (*u*), and in cases where it is not subject to that fetter (*x*). She cannot be made bankrupt in respect of her liabilities unless she happens to be carrying on a trade (*y*). In that case a bankruptcy notice under section 1, sub-section 1 (g) of the Bankruptcy Act, 1914, can be issued against her on a final order or judgment obtained against her, whether or not expressed to be payable out of her separate property, as though she were personally bound to pay the judgment debt or sum ordered to be paid (*z*), and on non-compliance therewith a receiving order can be made.

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otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant (the married woman), not subject to any restriction against anticipation, unless by reason of section 19 of the Married Women's Property Act, 1882, the property shall be liable to execution, notwithstanding such restriction." This is also the proper form of judgment to be used in an action against a widow upon a contract entered into by her during coverture after the passing of the Married Women's Property Act, 1882, and before the passing of the Married Women's Property Act, 1893. *Softlaw* v. *Welch*, [1899] 2 Q. B. 419; 68 L. J. Q. B. 940.

(*r*) *Aylett* v. *Ashton*, 1 My. & Cr. 105; *Atwood* v. *Chichester*, 3 Q. B. D. 722; 47 L. J. Q. B. 300.

(*s*) Per Esher, M.R., in *Holtby* v. *Hodgson*, 24 Q. B. D. 105; 59 L. J. Q. B. 46.

(*t*) Sect. 1, sub-s. 2; sect. 15.

(*u*) *Meager* v. *Pellew*, 14 Q. B. D. 793; *Draycott* v. *Harrison*, 17 Q. B. D. 147.

(*x*) *Scott* v. *Morley* (*ubi sup.*).

(*y*) 4 & 5 Geo. V. c. 59, s. 125, sub-s. 1.

(*z*) Sect. 125, sub-s. 2.

So, too, if carrying on a trade or business she leaves her place of business without paying her creditors or notifying her change of address, she commits an act of bankruptcy within section 1, sub-section 1 (d) of the Bankruptcy Act, 1914; though she has so left at her husband's request in order to live with him (*a*); and she becomes a "debtor" for some purposes when a judgment has been recovered against her; thus, a judgment on a valid contract obtained against her will entitle the successful party to an order for her examination as to her separate estate under Order xxv. r. 71, of the County Court Rules, 1903 (*b*), and Order xlii. r. 32, of the Rules of the Supreme Court, and may be enforced by a garnishee order attaching a debt due to her from a third person (*c*).

The Married Women's Property Act, 1893 (*d*), which renders the existence of free separate property at the time of a married woman entering into a contract or incurring a liability no longer necessary, has not altered the law in this respect, for the wording of section 1 is to the effect that "every contract hereafter entered into by a married woman . . . shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract." Further, there is a proviso which preserves the well-established effect of the restraint upon anticipation. The principles of the above decisions will still hold good as to the liability of a married woman on her debts and contracts effected after December 5, 1893 (*e*).

The distinction between the liability of a married woman for her ante-nuptial and post-nuptial debts is that the former is a personal liability in its fullest sense—that is, she was liable to be taken in execution for it, and is now liable to a debtors' summons in respect of it (*f*); while the latter is a proprietary one only—that is, confined to such separate estate as she may possess (*g*). Formerly it was the usual practice to declare the separate property of the married woman vested in her or her

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(*a*) *Re Worsley*, [1901] 1 Q. B. 309; 70 L. J. K. B. 93.
(*b*) *Countess of Aylesford* v. *Great Western Railway Co.*, [1892] 2 Q. B. 626.
(*c*) *Holtby* v. *Hodgson, Bateson* (*Garnishee*), 24 Q. B. D. 103; 59 L. J. Q. B. 46.
(*d*) 56 & 57 Vict. c. 63.
(*e*) The date of the coming into operation of the Act.
(*f*) See *Dillon* v. *Cunningham*, L. R. 8 Ex. 23; 42 L. J. Ex. 11; and *Robinson* v. *Lynes*, [1894] 2 Q. B. 577; 63 L. J. Q. B. 759.
(*g*) See *Re Hewett, Ex parte Levene*, [1895] 1 Q. B. 328; 64 L. J. Q. B. 185.

trustees chargeable with the satisfaction of her liability, and to charge it with that amount, and that an inquiry should be made of what the separate property consisted, at the time of making the contract, and in whom it was vested (*h*). Such inquiry, as has been seen, is as necessary now as heretofore, in order to ascertain whether her property is subject to a restraint upon anticipation, for in such case it is not liable to make good her creditor's claim. Under the present state of the law nothing, it would seem, can prevent her from disposing of her separate property before judgment; and the court would not on the part of a creditor restrain her from dealing with her property (*i*).

Joinder of Trustees.—It is not necessary to join her trustees (if any) in order to get a mere charge upon her property (*k*); but where payment out of the property is sought (which is the effect of such a judgment under Order XIV. r. 1), and not a mere charge, then they should be joined (*l*), but their joinder is not a condition precedent to judgment against the married woman (*m*). So where an order is obtained, appointing a receiver of the separate estate for the purpose of satisfying the claims of her creditors, the trustees need not be made parties to the application, though they must hand over to the receiver whatever property is capable of satisfying the debts of the married woman. The trustees are not superseded by the receiver, but he is appointed over the head of the married woman (*n*). Where a married woman whose property is subject to a restraint upon anticipation incurs a liability, and becomes a widow, a creditor who obtains judgment against her separate estate not subject to such restraint cannot enforce it by the appointment of a receiver or otherwise (*o*).

Lex Loci Contractus.—The capacity of a married woman to effect valid contracts should be regulated by the law of the place where the contract is made, and not necessarily the law of her domicil. In the large majority of instances the persons to whom she might hold herself out as having the capacity to contract would be ignorant of any disability attaching to her

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(*h*) See *Picard* v. *Hine*, L. R. 5 Ch. App. 274; *Pike* v. *Fitzgibbon*, 17 Ch. D. 454; 49 L. J. Ch. 493; *Gloucestershire Banking Co.* v. *Phillips* (*Creagh, Third Party*), 12 Q. B. D. 533.

(*i*) *Robinson* v. *Pickering*, 16 Ch. D. 660; 50 L. J. Ch. 527.

(*k*) *Picard* v. *Hine* (*ubi sup.*); *Collett* v. *Dickenson*, 11 Ch. D. 687.

(*l*) *Atwood* v. *Chichester*, 3 Q. B. D. 722; *Collett* v. *Dickenson*, 11 Ch. D. 687.

(*m*) *Perks* v. *Mylrea* (1884), W. N. 64.

(*n*) *Re Peace and Waller*, 24 Ch. D. 405.

(*o*) *Pelton* (*Brothers*) v. *Harrison*, [1891] 2 Q. B. 422; 60 L. J. Q. B. 742.

by the law of her domicil. To ask a small English or French tradesman to know the law of any State of the American Union would be to reduce justice to a farce. If she has made a valid contract according to the *lex loci contractus*, her creditors should be allowed to sue her in the forum of her domicil if it became necessary to do so (*p*).

How a married woman may proceed to vindicate her rights arising out of her contracts, and in what manner a creditor may enforce his remedy against her, that is, what property may be taken in execution, will be discussed in a subsequent chapter (*q*).

(*p*) See Dicey, Dom. 193.
(*q*) See *post*, chap. xiv. pp. 401 *et seq.*

CHAPTER XIII.

SEPARATE ESTATE.

Definition.—Separate estate may be defined to be that property which a married woman is entitled to hold and dispose of unaffected by any marital rights or engagements during the period of coverture. The expression was formerly used to describe that kind of property which was unaffected by the marital right in contradistinction to that property over which the husband's ordinary legal rights prevailed.

By legislative enactment all kinds and descriptions of property belonging to a woman married after January 1, 1883, are her separate property. There is no differentiating mark between property expressly clothed with the attributes of separate estate and property without them. Previously to the Married Women's Property Act, 1882 (*a*), separate property was created by the express act and determination of those who called it into existence, or by the force of legislative authority, which stamped certain but limited classes of property with the incidents of ownership unaffected by coverture. Under the former state of the law considerable difference existed between what was known as equitable separate estate and statutory separate estate, but since the passing of the above Act the difference between them, so far as regards women married after it came into force, has been practically abrogated (*b*). Equitable separate property was that property which equity through the medium of trusts, and carrying out the intention of the parties, treated as property free from the marital control during coverture. But now all property belonging to a married woman (not affected by a settlement), whether vested in trustees (in which case it would be still equitable) or not, is property which comes under the operation of the Act, and so is in a sense statutory. Equity, however, will preserve its jurisdiction over purely equitable separate property, as where the legal estate is vested in trustees;

(*a*) 45 & 46 Vict. c. 75.

(*b*) *British Union National Insurance Co.* v. *Rawson*, [1916] 2 Ch. 476; 83 L. J. Ch. 596.

and their functions will be necessary where it is desired to restrain a woman from dealing with the property during coverture. But since the law existing anterior to the passing of this Act still affects a large number of married women, it will be necessary to deal with it, and recent changes will be discussed as part only of the general subject. This chapter will be divided into the following sections:—

SECTION 1.—Creation and Growth of Separate Estate.
SECTION 2.—Statutory Extension of Separate Estate.
SECTION 3.—Power of disposition over Separate Estate: (a) *Inter vivos*; (b) By Will; (c) By Power of Appointment.
SECTION 4.—Restraint upon Anticipation.
SECTION 5.—Separate Property in Respect of which Liability Exists.
SECTION 6.—Questions between Husband and Wife as to their Property.
SECTION 7.—Pin-money and Paraphernalia.

SECTION 1.

Creation and Growth of Separate Estate.

At common law, as has already been seen, the *jus maritale* prevailed over all property of the wife belonging to the wife at the time of marriage, and subsequently coming to her, as to personal property absolutely, as to realty by giving the husband an interest in it for the period of coverture, or for his life. But equity, under the guidance of a succession of eminent Chancellors, tempered the harshness of this common law doctrine by recognition of the principles of the separate use. The doctrine of the separate use is bound up with and involved in the doctrine of trusts. When trusts became an integral portion of the law, then the separate property of married women was recognized and approved. As soon as the Court of Chancery placed the doctrine of trusts upon a firm and secure basis, the creation of separate estate through the medium of trusts in favour of married women was approved and fostered by the equity courts (*d*). Equity was the inventress of the whole

(*d*) Hayes, Conv. 500.

doctrine (*e*). Wealth in the shape of personalty was largely increasing in this country and becoming of great importance; and females on their marriage or during coverture brought with them or acquired fortunes of considerable extent; thus, it became a conviction that it was expedient, for "the interests of society, that means should exist by which, upon marriage, either the parties themselves by contract, or those who intended to give bounty to a family, might secure property for the benefit of the wife and children, without that property being subject to the control of the husband" (*f*). This doctrine was, no doubt, a serious inroad into the theory of the unity of the spouses, and even into that of the subordination of the wife during coverture, but was founded on the clearest principles of justice that what was given to one should not be taken by another and diverted from the purposes for which it was originally intended; for that which might have been given to the wife to support her and her children when left a widow might be taken by a spendthrift husband and squandered, or claimed by his creditors to satisfy debts from which she had reaped no advantage. It is the essence of the separate use that the wife's property shall be independent of and free from the control and interference of her husband.

There are traces of this doctrine in the reign of Queen Elizabeth (*g*); thus, in *Doyley* v. *Persull* (*h*), Lord Keeper Finch declared that since Queen Elizabeth's time it had been the constant course of their Court to set aside and frustrate all incumbrances and acts of the husband upon the *trust* in the wife's term; and that he should neither charge nor grant it away. By the time of Lord Hardwicke the doctrine was well established; and in that of Lord Thurlow it was placed on such a firm basis that nothing short of legislative interference could have annulled it. The common law Courts recognized its existence (*i*).

This doctrine has been summed up as follows: "In this

(*e*) See *Doyley* v. *Persull*, 2 Ch. Cas. 225.

(*f*) Per Lord Cottenham in *Rennie* v. *Ritchie*, 12 Cl. & Fin. 234.

(*g*) See *Sankey* v. *Goldine*, 21 & 22 Eliz. *Feme covert* joined with *baron* in sale of part of her inheritance: quarrels and separation. £100 from sale allotted to wife for maintenance, and placed in hands of a trustee for *feme*. *Feme* sues administrator of trustee, who demurs that her husband is not joined. Demurrer overruled, and defendant made to answer. See also *Gorges* v. *Chancy*, cited in *Pridgeon's Case*, 2 Ch. Cas. 117.

(*h*) *Ubi sup.* In this case the wife had assigned her term in trust for herself before marriage; a mortgage by the husband of the term was held bad.

(*i*) *Davison* v. *Atkinson*, 5 T. R. 434.

court a married woman has, for more than a century (*k*), been considered as capable of possessing property to her own use independently of her husband; such property is called her separate estate, and, in respect of it, she is considered as a *feme sole* enjoying, and capable of exercising, her rights as such. The property may be acquired either by contract with the husband before the marriage, or by gift from him, or from any stranger wholly independent of such contract; so far as his legal rights as husband may interfere, the court will treat him as a trustee; and property held by or for the wife to her separate use, if unaccompanied by any restraint, is subject to her power of alienation, and the other incidents of property held by men or single women. . . . Property given to a woman for her separate use, independent of any husband, may, under the authority of this Court, be enjoyed by her during her coverture, as her separate estate although the property originally, or at any subsequent period or periods of time, became vested in her when discovert. In respect of such separate estate, she is by this court considered as a *feme sole*, although covert. Her faculties as such, and the nature and extent of them, are to be collected from the terms in which the gift is made to her, and will be supported by this court for her protection. The words 'independent of a husband,' whether express or implied in the terms of the gift, mean no more than that this court will not permit the marital power of the husband to be used in contravention of the enjoyment of the property, according to the terms of the gift. If the gift be made for her sole and separate use, without more, she has during the coverture an alienable estate independent of her husband. If the gift be made for her sole and separate use, without power to alienate, she has during the coverture the present enjoyment of an unalienable estate, independent of her husband. In either of these cases she has, when discovert, a power of alienation; the restraint is annexed to the separate estate only, and the separate estate has its existence only during coverture; whilst the woman is discovert, the separate estate, whether modified by restraint or not, is suspended, and has no operation, though it is capable of arising upon the happening of a marriage" (*l*).

How Separate Estate Created.—To constitute separate estate,

(*k*) The date of this judgment was 1838.

(*l*) Per Lord Langdale, M.R., in *Tullett* v. *Armstrong*, 1 Beav. 21, 22, and 32, 33.

with its consequences, the intervention of trustees was usual in order to obviate the influence of the husband over the wife, and to render her property more secure from his control; but the appointment of trustees was not actually essential (*m*), and where necessary the husband himself (in cases where the legal estate vested in him) was treated as a trustee, on the well-established equity principle that a trust shall never fail for want of a trustee (*n*), and where property was given to the husband for his wife's separate use, he was held to be her trustee (*o*); or when he wrongfully acquires possession of her separate property (*p*). The necessity for trustees of marriage settlements is dealt with in Chapter VI, p. 89, *ante*.

The separate use applies as much to real as to personal property; and where realty is settled or directed to be held to a married woman's separate use, the husband is not entitled to the rents and profits.

By Gift.—Separate estate may be created by gift *inter vivos*, or by legacy of a stranger, or by gift from the husband, with words sufficient to constitute a separate interest in the wife. Such a gift may be made to a woman when covert, or discovert, but to take effect on her coverture; so that, on becoming covert, she will hold it as separate estate free from marital control. This gift may be made to a woman in anticipation of a marriage generally, or of a particular marriage; or not in contemplation of any marriage, but with the intention that if the donee marry, any husband shall not exercise his marital control over it (*q*). The intention to create separate estate, and the sufficiency or insufficiency of the words to be used, are discussed in after-pages.

By Ante-nuptial Agreement.—The separate use may be created by ante-nuptial agreement on the part of the husband that his wife shall be entitled to her personal property for her separate use (*r*); and this arrangement is usually carried out by a marriage settlement executed between the parties. If the

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(*m*) But as late as 1710 it was doubted by Lord Chancellor Cowper whether a bequest of personal property to a married woman for her separate use without trustees did not pass to her husband; however, in *Rolfe* v. *Budden*, Bunb. 187, and *Bennet* v. *Davis*, 2 P. Wms. 316, where property was settled to the separate use of a married woman without trustees, her husband was made a trustee.

(*n*) *Bennet* v. *Davis* (*ubi sup.*). *Ex parte Sibeth*, *Re Sibeth*, 14 Q. B. D. 417; 54 L. J. Q. B. 322.

(*o*) *Darley* v. *Darley*, 3 Atk. 399.

(*p*) *Wassell* v. *Leggatt*, [1896] 1 Ch. 554; 65 L. J. Ch. 240.

(*q*) *Tullett* v. *Armstrong* (*ubi sup.*).

(*r*) *Walrond* v. *Goodman*, 16 Q. B. D. 121; 55 L. J. Q. B. 323.

property is not actually so settled, and the legal title vests in the husband, he will be held a trustee of the property for his wife's separate use (*s*). This agreement must be in writing; if not, the Statute of Frauds (*t*) will prevent its enforcement, unless the husband has been guilty of fraud, in which case equity will relieve. It has also been suggested that if such parol agreement has been acted upon, as by handing over the agreed property to trustees of the settlement, it would be binding upon the husband (*u*). Though there might have been a total renunciation of the marital right, yet if the woman did not sign the agreement, her property did not become her separate estate so as to enable her to dispose of it by will during coverture (*x*).

By Post-nuptial Arrangement.—If the husband after marriage agrees that certain property belonging to the wife shall continue to belong to her, such property will be to her separate use, and freed from his control and engagements. So, too, where the husband acquiesces in his wife carrying on a business or trade separately, the profits of the business or trade will be her separate property; thus, where the husband allowed his wife for her separate use to make profit of certain farm produce, the money she made out of the business was held to be her separate property; and she was allowed to prove against his estate in respect of a loan she made to him out of it (*y*); and where he allowed her to carry on a trade pursued by her as a single woman, and did not in any way interfere with it, the stock-in-trade and profits of the business were held to be her separate property (*z*). One effect of the Married Women's Property Act, 1882, is that there is no longer any need for a specific agreement between husband and wife that property coming to her during marriage shall be her separate property; for the characteristics and attributes of separate estate are at once stamped upon any property coming to a married woman, in respect of which it may be said she has a statutory settlement to her separate use.

Expression of Intention to Create Separate Estate.—The intention to limit the marital interest in the wife's property and create a separate use for the wife must be clear, though it is not absolutely necessary in the instrument affecting the gift, whether

(*s*) *Tyrrell* v. *Hope*, 2 Atk. 558.
(*t*) 29 Car. II. c. 3.
(*u*) Per Wigram, V.-C., in *Simmons* v. *Simmons*, 6 Ha. 352.
(*x*) *Dye* v. *Dye*, 13 Q. B. D. 147; 53 L. J. Ch. 442.
(*y*) *Slanning* v. *Style*, 3 P. Wms. 334.
(*z*) *Ashworth* v. *Outram*, 6 Ch. D. 923; 46 L. J. Ch. 687; *Re Dearmer, James* v. *Dearmer*, 53 L. T. 905.

will or deed, to use technical expressions (*a*). Sometimes it happened that the expressions used were ambiguous, in which case recourse was had to the context and surrounding circumstances for the purpose of gathering what was intended; as, for instance, a mere direction that the property shall be at a wife's own disposal (*b*); or that her receipt shall be a sufficient discharge (*c*). As such questions may still arise in the case of persons married before January 1, 1883 (*d*), it has been deemed expedient to set forth shortly what expressions have been held sufficient and what insufficient to create a separate interest in the wife. But as regards persons married after that date, this is a matter of antiquarian rather than practical interest, because by the wide and sweeping effect of the Act of 1882, all property, of whatsoever description, and however derived, belonging to a woman at the date of her marriage or acquired afterwards by her, is her separate property, free from marital control unless the husband has stipulated for any interest in it, and no question as to the intention of the donor or settlor can possibly arise.

What Words Sufficient.—The following expressions have been held sufficient to constitute a separate interest in the woman (*e*): "for her full and sole use and benefit" (*f*); "for her own sole use and benefit" (*g*); "for her sole use" (*h*); "for her sole and separate use and benefit" (*i*); "for her sole and separate use" (*k*); "for her sole use and benefit" (*l*); "for her own sole use, benefit, and disposition" (*m*); "for her sole and absolute use" (*n*); "for her own use, and at her own disposal" (*o*); "to be at her disposal and to do therewith as she shall think fit" (*p*); "solely and entirely for her own use and benefit" (*q*); "for her own use independent of any husband" (*r*); "not subjected to the control of her husband" (*s*); "for her own use

(*a*) *Stanton* v. *Hall*, 2 R. & Myl. 180; *Darley* v. *Darley*, 3 Atk. 399; *Re Peacock's Trusts*, 10 Ch. D. 490; 48 L. J. Ch. 265.
(*b*) *Prichard* v. *Ames*, Turn. & Russ. 222.
(*c*) *Lee* v. *Prieaux*, 3 Bro. C. C. 381.
(*d*) Date of coming into operation of the Act.
(*e*) Collected in Peach. Sett. 280, 281.
(*f*) *Arthur* v. *Arthur*, 11 Ir. Eq. Rep. 511.
(*g*) *Ex parte Killick*, 3 M. D. & De G. 480.
(*h*) *Lindsell* v. *Thacker*, 12 Sim. 178.
(*i*) *Archer* v. *Rorke*, 7 Ir. Eq. Rep. 478.
(*k*) *Parker* v. *Brooke*, 9 Ves. 583; *Adamson* v. *Armitage*, 19 Ves. 415.
(*l*) —— v. *Lyne*, Younge, 562. (*m*) *Ex parte Ray*, 1 Madd. 199.
(*n*) *Davis* v. *Prout*, 7 Beav. 288.
(*o*) *Prichard* v. *Ames* (*ubi sup.*).
(*p*) *Kirk* v. *Paulin*, 9 Vin. Abr. 96, pl. 43.
(*q*) *Inglefield* v. *Coghlan*, 2 Coll. 247.
(*r*) *Wagstaff* v. *Smith*, 9 Ves. 520.
(*s*) *Bain* v. *Lescher*, 11 Sim. 397.

and benefit independent of any other person" (*t*); "for her livelihood" (*u*); "the interests and profits to be paid to her, and the principal to her or to her order by note or writing under hand" (*x*); "that she should enjoy and receive the issues and profits of the estate" (*y*); so, too, a direction that certain property should be delivered up to a married woman "whenever she should demand or require the same" (*z*). So, also, a similar construction has been applied to the words "to be laid out in what she shall think fit" (*a*); "for her separate use" (*b*); "free of control of any present husband or husband to come" (*c*); a direction to trustees to pay, apply, and dispose of annual proceeds for any widow whom he (the testator's son) shall leave for her life (*d*); or "that the husband is to have no control" (*e*); and "sole use and disposal" (*f*).

What Words Insufficient.—The following expressions have, on the contrary, been held insufficient: "To pay to a married woman and her assigns" (*g*); or a gift "to her use" (*h*); "to her own use and benefit" (*i*); "to her absolute use" (*k*); (unless "absolute" can be construed to be equivalent to "separate" (*l*)); payment directed to be made "into her own proper hands to and for her own use and benefit" (*m*); or to "be under her sole control" (*n*); or in a devise without the intervention of trustees "for her sole use and benefit" (*o*); or "a direction to transfer to her own use and benefit" (*p*); so a bequest to a woman and her assigns for her life, "for her and their own absolute use and benefit" (*q*); so, too, a bequest to the testator's wife for life of the income of property "to be expended by her as she might

(*t*) *Margetts* v. *Barringer*, 7 Sim. 481.
(*u*) *Darley* v. *Darley* (*ubi sup.*).
(*x*) *Hulme* v. *Tenant*, 1 Bro. C. C. 16.
(*y*) *Tyrrell* v. *Hope*, 2 Atk. 558.
(*z*) *Dixon* v. *Olmius*, 2 Cox, Eq. Cas. 414.
(*a*) *Atcherley* v. *Vernon*, 10 Mod. 518.
(*b*) *Massy* v. *Rowen*, L. R. 4 H. L. 288.
(*c*) *Anderson* v. *Anderson*, 2 Myl. & K. 427.
(*d*) *Austin* v. *Austin*, 4 Ch. D. 233; 46 L. J. Ch. 92.
(*e*) *Edwards* v. *Jones*, 14 W. R. 815.
(*f*) *Bland* v. *Dawes*, 17 Ch. D. 794; 50 L. J. Ch. 252; see *Fox* v. *Hawks*, 13 Ch. D. 822; 49 L. J. Ch. 579.
(*g*) *Dakins* v. *Beresford*, 1 Ch. Cas. 194.
(*h*) *Jacobs* v. *Amyatt*, 1 Madd. 376 *n.*
(*i*) *Johnes* v. *Lockhart*, cited 3 Bro. C. C. 383 *n.*
(*k*) *Ex parte Abbott*, 1 Deac. 338.
(*l*) *Shewell* v. *Dwarris*, Johns. 172.
(*m*) *Tyler* v. *Lake*, 4 Sim. 144.
(*n*) *Massey* v. *Parker*, 2 Myl. & K. 174.
(*o*) *Gilbert* v. *Lewis*, 1 De G. J. & Sm. 38; *Massy* v. *Rowen*, L. R. 4 H. L. 288.
(*p*) *Darcy* v. *Croft*, 9 Ir. Ch. Rep. 19.
(*q*) *Rycroft* v. *Christie*, 3 Beav. 238.

think fit and proper, and agreeable to her free will and pleasure" (*r*). A gift to the separate use was not implied from the mere existence of the restraint upon anticipation (*s*).

Gift of Income Vests the Capital of Personalty.—A gift of the produce of a fund is, under ordinary circumstances, a gift of the produce in perpetuity, and therefore operates as a gift of the fund itself, unless a contrary intention appears. Thus, where there was a bequest to a woman of a fund with the interest to be vested in trustees, such income to be for her sole use and benefit, the capital was deemed vested for her separate use (*t*); and where a testator simply directed his trustees to convert the fund for the benefit of a married woman independently of the control of her husband, the married woman was held entitled to the whole fund to her separate use (*u*).

Separate Interest in Accumulations.—Where a fund is settled to the separate use of a married woman, the income or produce of that fund is also affected by the separate use of the *corpus*. Savings out of her separate income by a married woman are also her separate estate; for "as she had a power over the principal, she consequently had it over the produce of it, for the sprout is to savour of the root, and to go the same way" (*x*). This power need not be one which the married woman could exercise during the coverture, for she may be restrained from anticipating the capital; but the savings of the produce of the principal would be separate estate. The savings of her separate estate will be liable to all the incidents of separate estate (*y*), except that the savings in the hands of trustees of a married woman who is restrained from anticipating will not be liable to the restraint unless it can be proved that she transferred such savings to be held on like trusts and conditions as the capital (*z*). Where a husband lives apart from his wife, and remits money to her for her support and maintenance, it will be considered as her separate estate; and he cannot bring an action against his wife to recover the savings (*a*). Arrears of separate estate in the

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(*r*) *Re Graham's Trusts*, 20 W. R. 289.
(*s*) *Baggett* v. *Meux*, 1 Coll. 138; *Stogdon* v. *Lee*, [1891] 1 Q. B. 661; 60 L. J. Q. B. 669.
(*t*) *Adamson* v. *Armitage*, 19 Ves. 416.
(*u*) *Simons* v. *Horwood*, 1 Keen, 7. See also *Elton* v. *Shepherd*, 1 Bro. C. C. 552.
(*x*) Per Lord Keeper Sir Nathan Wright in *Gore* v. *Knight*, 2 Vern. 535.
(*y*) *Butler* v. *Cumpston*, L. R. 7 Eq. 16; 42 L. J. Ch. 824.
(*z*) *Ibid.*
(*a*) *Brooke* v. *Brooke*, 25 Beav. 342; but see *Messenger* v. *Clarke*, 19 L. J. Ex. 306.

hands of trustees, due at the time of a second marriage, will be considered as retaining their original character (*b*). But the dividends of separate estate, and railway stocks representing part of her separate property sold *after his death*, are not separate estate (*c*).

Duration of the Separate Estate.—The separate use does and can only exist during coverture, for when discovert there is no person from whom she can hold her property separately and apart. Where property is limited to the separate use of a single woman, who afterwards marries, and does not renounce her rights over her property, the separate use springs into existence at the moment of marriage (*d*). When the coverture is terminated, the surviving wife takes and holds her separate property freed from all equitable restraints and conditions, and can deal with it as though she had always been a single woman. A question directly proceeding from the foregoing proposition has been the subject of much litigation in the Courts. It is whether, if property be settled upon a married woman to her separate use in contemplation of marriage, and she marries, and becomes discovert, and marries again, the separate use revives on her second marriage. This question has been answered in the affirmative, but not until after some struggle and conflicting decisions of the Courts (*e*). The ambulatory nature of the separate use was finally decided by Lord Langdale, M.R., and Lord Cottenham, L.C., in the case of *Tullett* v. *Armstrong* (*f*), in which it was clearly laid down that the separate use, though it ceased on the married woman becoming discovert, revived on her subsequent marriage (*g*). If the trust for the separate use is limited by precise words to a particular coverture, and the married woman becomes discovert, on the termination of that coverture the separate use is gone altogether; and if she marry again, without having disposed of the *corpus* in the meantime, and without a settlement, her second husband's rights will exist over it (*h*).

Renunciation of Separate Use.—A woman could on marriage renounce her separate use, but the evidence must be clear that she voluntarily gave up such an important right; and the Court

(*b*) *Ashton* v. *M'Dougall*, 5 Beav. 56; but see *Spicer* v. *Dawson*, 5 W. R. 431.
(*c*) *Mayd* v. *Field*, 3 Ch. D. 587; 45 L. J. Ch. 699.
(*d*) *Anderson* v. *Anderson*, 2 Myl. & K. 427.
(*e*) See Hayes, Conv. 500-541.
(*f*) 1 Beav. 1.
(*g*) See *Hawkes* v. *Hubback*, L. R. 4 Eq. 5; 40 L. J. Ch. 49.
(*h*) *Moore* v. *Morris*, 4 Dr. 33; *Benson* v. *Benson*, 6 Sim. 126.

did not readily assume that she intended to give it up (*i*). Thus, it would never allow a female infant on marriage to renounce the separate use in property belonging to her (*k*).

This question of the ambulatory nature of the separate use cannot arise in the case of marriages taking place after the Married Women's Property Act, 1882, came into force, for by the operation of that statute a separate interest in her own property existing, or to come into existence, is created at the moment of marriage (*l*); and a limitation of the separate use to a particular coverture would not on the termination of that coverture, and the woman's subsequent marriage, prevent the statutory separate use attaching to her property. There is, however, nothing in this Act, it is submitted, to prevent a single woman on marriage, or a married woman during coverture, making a valid contract with her husband to renounce the separate use; and the property which belonged to her at the date of marriage, or was afterwards acquired by her, and was capable of being disposed of by her, would in such a case come under the marital control. This power would seem to be exercisable equally over the property settled by the act of the parties as over that settled by the operation of the law, which she was not restrained from alienating or anticipating. Of course her ante-nuptial creditors could follow it in her husband's hands, but her legal personal representatives, or her heirs, could lay no valid claim to it; indeed, her capacity for so disposing of her property is increased rather than diminished under the Act. The adultery of the wife was never held to affect her rights over property settled to her separate use (*m*), and *a fortiori* since the Act cannot affect them.

Section 2.

Statutory Extension of the Separate Estate.

Before proceeding further to discuss the nature and incidents of separate estate, its extension by various statutes will be noticed. The growth of statutory separate property is of very

(*i*) Macq. H. & W. 343.
(*k*) *Johnson* v. *Johnson*, 1 Ke. 648.
(*l*) Sect. 1, sub-s. 1; ss. 2 and 5. Doubt has been cast upon the accuracy of this proposition, and the Court of Chancery has recognized a difference between the separate use created by a settlement and that created by the statute. See *Stevens* v. *Trevor-Garrick*, [1893] 2 Ch. 307; 62 L. J. Ch. 660; and *Buckland* v. *Buckland*, [1900] 2 Ch. 534.
(*m*) *Seagrave* v. *Seagrave*, 13 Ves. 443.

recent date in this country, and is contained in six statutes, viz., the three Acts of 1857, 1858, and 1895, dealing with proceedings for judicial separation, and the Married Women's Property Acts of 1870, 1882, and 1893 The contents of these statutes will here be shortly summarized.

Protection Order.—By the Act to amend the law relating to divorce and matrimonial causes (*n*), a wife who was deserted by her husband might, at any time after such desertion, apply to the proper persons (*o*) for an order to protect her money or property acquired by her own lawful industry. If she obtained such protection order, she was, and was deemed to be, during the continuance thereof, in the like position in all respects, with regard to property and contracts and suing and being sued, as if she had obtained, under the Act, a decree of judicial separation (*p*). Judicial separation under this Act constituted the woman (as long as it lasted) a *feme sole* with respest to property of every description acquired by or devolving upon her (*q*), also for the purposes of contract, and in respect of wrongs and injuries (*r*), and of suing and being sued in any civil proceeding (*s*). If a wife was possessed of choses in action or reversionary interests, which were not reduced into possession by her husband, and she obtained an order for protection, such property became hers absolutely, and her husband's interest in it was gone (*t*); and any dealings with it on his part, whether by way of sale or mortgage, were ineffectual to give any title to his assignees (*u*); and resumption of cohabitation, apart from any agreement between the spouses, did not alter the position of the parties (*x*). This privilege was conferred in order to protect the hard-won earnings of the humbler classes who could not afford to come to the Divorce Court for a judicial separation. The desertion on the part of the husband must be unlawful, unjustifiable, and permanent; but the property of the married woman, to be pro-

(*n*) 20 & 21 Vict. c. 85.

(*o*) If resident within the metropolitan district to a metropolitan police magistrate, if resident in the country to the justices in petty sessions; and by 21 & 22 Vict. c. 108, s. 6, in either case to the Judge Ordinary (now the President of, or a judge attached to, the Probate, Divorce, and Admiralty Division of the High Court).

(*p*) Sect. 21.

(*q*) Sect. 25.

(*r*) *Ramsden* v. *Brearley*, L. R. 10 Q. B. 147; 44 L. J. Q. B. 46.

(*s*) Sect. 26.

(*t*) *Johnson* v. *Lander*, L. R. 7 Eq. 228; 38 L. J. Ch. 229; *Re Coward and Adams' Purchase*, L. R. 20 Eq. 179; 44 L. J. Ch. 384; *Re Emery's Trusts*, 50 L. T. 197.

(*u*) *Re Insole*, L. R. 1 Eq. 470; 35 L. J. Ch. 177; *Re Emery's Trusts* (*ubi sup.*).

(*x*) *Re Emery's Trusts* (*ubi sup.*).

tected, must be acquired by her lawful industry; thus, her gains by living in adultery, or by keeping a brothel, will not be protected (*y*). The protection order has a retrospective effect, extending back to the commencement of the desertion (*z*), but does not affect property acquired by the married woman before the desertion (*a*); and any restraint imposed on such property by a pre-existing settlement must have effect given to it (*b*). But property acquired after the date of the decree for separation and during separation is not within a covenant to settle after-acquired property during coverture (*c*). Where there is no settlement, a married woman may have money paid out of Court to her (*d*); but the decree of judicial separation or protection order does not affect the validity of existing settlements. The will of a married woman so protected is capable of passing property acquired by her during the desertion which is the foundation of the order for protection (*e*). In fine, the position of a *feme sole* is conferred upon the married woman until the order is reversed or discharged (*f*), not only as regards contracts (*g*), but property (*h*). The husband or any of his creditors, or other person claiming under him, may move to have the order discharged (*i*); even after the death of the wife (*k*). When the wife returns to cohabitation with her husband all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband while separate (*l*).

Extension of Protection Afforded.—By the Act of 1858 amending the Divorce Act of the previous year (*m*), the effect

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(*y*) *Mason* v. *Mitchell*, 3 H. & C. 528.
(*z*) *Re the Goods of Ann Elliott*, L. R. 2 P. & M. 274; 40 L. J. P. M. & A. 76.
(*a*) *Waite* v. *Moriand*, 38 Ch. D. 135; 57 L. J. Ch. 655; *Hill* v. *Cooper*, [1893] 2 Q. B. 85; 62 L. J. Q. B. 423.
(*b*) *Waite* v. *Morland* (*ubi sup.*).
(*c*) *Dawes* v. *Creyke*, 30 Ch. D. 500; 54 L. J. Ch. 1096.
(*d*) *Ewart* v. *Chubb*, L. R. 20 Eq. 454; 45 L. J. Ch. 108.
(*e*) *In the Goods of Ann Elliott* (*ubi sup.*).
(*f*) 20 & 21 Vict. c. 85, s. 21; 21 & 22 Vict. c. 108, s. 8.
(*g*) Sect. 26.
(*h*) See *Re Hughes, Hughes* v. *Brandon*, [1898] 1 Ch. 529; 67 L. J. Ch. 279. In this case, which arose on an originating summons for the administration of an estate, a woman had married before 1883 and obtained a protection order; she then entered into a contract, though at the time not possessing any free separate property, but subsequently became entitled to funds over which she had a general power of appointment which she exercised by will while the order was still in force; her creditor was held entitled to come in and prove in the administration.
(*i*) *Ibid.* s. 21, as amended by 27 & 28 Vict. c. 44, s. 1.
(*k*) *Mudge* v. *Adams*, 6 P. D. 54; 50 L. J. P. 49.
(*l*) *Ibid.* s. 25, see now Supreme Court of Judicature (Consolidation) Act, 1925, s. 194 (b) (iii).
(*m*) 21 & 22 Vict. c. 108.

of a decree for judicial separation, or an order for protection, was extended to property to which the wife became, or should become, entitled as executrix or administratrix, or trustee since the sentence of separation or the commencement of the desertion (*n*). Persons or corporations making payment to married women under orders of protection which have been discharged, reversed, or varied, or after the cesser of the separation, are to be protected and indemnified (*o*). Under an order a married woman may obtain payment to herself of money in Court (*p*), or in the hands of trustees (*q*), though it is given to her separate use without power of anticipation (*r*); and as executrix she may transfer stock standing in the name of her testator in the books of the Bank of England, and receive dividends as if she were a single woman (*s*).

Separation Order. — Under the Summary Jurisdiction (Married Women) Act, 1895 (*t*), a married woman may obtain an order containing (*inter alia*) a provision that she be no longer bound to cohabit with her husband, and that he make her a weekly allowance. This provision while in force has the effect in all respects of a decree of judicial separation on the ground of cruelty (*u*).

Since the Married Women's Property Act, 1882, there is no necessity for the granting of protection orders for the safeguarding of a married woman's property; and the only real ground for preserving them is to exclude the marital interest in the wife's property on her death intestate; for it is to be noticed that the position of a married woman judicially separated is that of a *feme sole*, and her interest in and powers over her property are not the same as those conferred upon her by the Court of Chancery; for the equitable separate estate ceases on her death, and if she die without having disposed of it, her husband's right over it arises, and he takes it either *jure mariti*, or after taking out letters of administration to her estate; but in the case of a woman judicially separated dying intestate, administration will not be granted to her husband but to her next-of-kin (*x*).

(*n*) Sect. 7. And see now Supreme Court of Judicature (Consolidation) Act, 1925, s. 194, sub-s. 2.
(*o*) Sect. 10.
(*p*) *Re Kingsley's Trusts*, 26 Beav. 84; *Re Rainsdon's Trusts*, 4 Dr. 446.
(*q*) *Cooke* v. *Fuller*, 26 Beav. 99.
(*r*) *Ibid.*
(*s*) *Bathe* v. *Bank of England*, 4 K. & J. 564.
(*t*) 58 & 59 Vict. c. 39, repealing 41 Vict. c. 16, s. 4; and 49 & 50 Vict. c. 52.
(*u*) Sect. 5 (a) and (c).
(*x*) *In the Goods of Worman*, 29 L. J. P. M. & A. 164. See Supreme Court of Judicature Act, 1925, s. 194, sub-s. 1.

Married Women's Property Act, 1870.—In 1870 the Married Women's Property Act (*y*) largely extended "statutory separate property," that is, certain classes of property stamped by the Legislature with the attributes and incidents of separate estate, which, but for that legislation, would not have been so impressed, because equity was unable to intervene and modify the common law rights of the husband over them.

Effect on Various Classes of Property.—The effect of this Act was as follows: it created a separate use in the wages and earnings of married women acquired by them in any employment, occupation, or trade in which they were engaged separately from their husbands, and in money or property acquired by them through the exercise of any literary, artistic, or scientific skill, and all investments of such wages or earnings (*z*); also in their deposits in savings banks (*a*), their property in the funds (*b*), or in joint-stock companies to the holding of which no liability attached (*c*), shares, &c., in certain benefit societies to which they might be entitled before their marriage (*d*). But in regard to the last four classes of property provisions were inserted protecting the rights of husbands and their creditors under certain circumstances (*e*). It also created a separate use in personal property without restriction as to nature or value devolving *ab intestato* on a woman married after the passing of the Act, and in sums of money not exceeding £200 to which she might become entitled under any deed or will (*f*); also in the rents and profits of any freehold, copyhold, or customary freehold descending upon her as heiress or co-heiress (*g*), but this interest does not enable her to dispose of the fee simple without a deed acknowledged (*h*); also in policies of insurance effected by her on her own life or the life of her husband for her separate use (*i*). This Act also conferred new remedies at law for the protection of her separate property, not only as

(*y*) 33 & 34 Vict. c. 93.
(*z*) Sect. 1.
(*a*) Sect. 2.
(*b*) Sect. 3.
(*c*) Sect. 4.
(*d*) Sect. 5.
(*e*) See preceding sections, and section 6
(*f*) Sect. 7. If under the same instrument but by different titles she derives several sums of money, each of them less than £200, though in the aggregate exceeding that amount, as between herself and her husband, she will be deemed to have acquired the separate use in each of such sums. *Re Davies, Harrison* v. *Davies*, [1897] 2 Ch. 204; 66 L. J. Ch. 512.
(*g*) Sect. 8.
(*h*) *Johnson* v. *Johnson*, 35 Ch. D. 345; 56 L. J. Ch. 326.
(*i*) Sect. 10.

regards third persons, but also her husband; thus it enabled a married woman to maintain actions, that is, actions at law, in her own name for the recovery of wages, earnings, money, and property declared by the Act to be her separate property, or property belonging to her before marriage, which her husband shall by writing have agreed with her shall belong to her after marriage as her separate property (*k*). It also confers upon her the like remedies, civil and criminal, for the protection of her property which she would have possessed if unmarried (*l*). In return for these increased rights, a married woman was rendered liable for her ante-nuptial debts (*m*); even where she took land as devisee of a testator which was liable for his unpaid debts, and which land may have been settled on her marriage without a restraint upon anticipation (*n*); and her husband was exonerated from all liability in respect of them, and remained only liable for her ante-nuptial torts (*o*). She was also rendered liable, if she had separate property, to support her husband (*p*), and her children (*q*), who had become chargeable to the parish, though in the case of the latter the primary liability of the father to maintain them was not affected. The general effect of this Act was summed up by the late Sir George Jessel in the case of *Howard* v. *Bank of England* (*r*): "It does appear to me that the present Act gives no power to contract to a married woman which she did not possess before. It does make certain property property to her separate use, to that extent carrying with it a power to contract in respect of that property which every married woman previously possessed in a Court of equity, and it superadds to that certain remedies in a Court of law which it is considered desirable to give to the married woman in respect of these small sums (that is, sums under £200), but beyond that I think the Act makes no alteration in the position of the married woman."

Married Women's Property Act, 1882.—The legal relations of a married woman to her property are now defined and settled by the Married Women's Property Act, 1882 (*s*), which was an

(*k*) Sect. 11. *Summers* v. *City Bank*, L. R. 9 C. P. 580; 43 L. J. C. P. 261.
(*l*) *Ibid.* *Sanger* v. *Sanger*, L. R. 11 Eq. 470; 40 L. J. Ch. 372; *London and Provincial Bank* v. *Bogle*, 7 Ch. D. 773; 47 L. J. Ch. 301.
(*m*) Sect. 12. *Axford* v. *Reid*, 22 Q. B. D. 548; 58 L. J. Q. B. 230.
(*n*) *Re Hedgely*, *Small* v. *Hedgely*, 34 Ch. D. 379; 56 L. J. Ch. 360.
(*o*) Effect of section 12.
(*p*) Sect. 13.
(*q*) *Ibid.*
(*r*) L. R. 19 Eq. 295, 301.
(*s*) 45 & 46 Vict. c. 75.

Act to amend and consolidate the Acts of 1870 and 1874, which are repealed by it, save so far as rights and liabilities accrued under them are preserved. Its provisions affect England and Ireland, but not Scotland. Its effect is wider and more sweeping than that of the Act of 1870. The Act was in many ways a new departure.

A married woman is now capable, in accordance with the provisions of the Act, of acquiring, holding, and disposing, by will or otherwise, of any real or personal property, as if she were a *feme sole*, without the intervention of a trustee (*t*). No words are necessary to create the separate estate, as the statute itself creates the separate use (*u*). All real and personal property belonging to her at the time of marriage, or acquired by or devolving upon her after marriage, including damages recovered by her in an action founded on contract or tort (*x*), shall be the separate property of every woman married after December 31, 1882 (*y*). All real and personal property, her title to which, whether vested or contingent, and whether in posession, reversion, or remainder, accrues on or after January 1, 1883, to a woman married before that date, shall be her separate property, and at her disposal (*z*). If she had testamentary capacity and separate estate before the Act came into force, and made a will before that date and died in her husband's lifetime, her will was efficacious to pass all separate property she might acquire under the Act (*a*). But she can only dispose of it by will in accordance with the provisions of the Act; and property acquired by her before the Act came into force cannot pass by her will, unless it is republished after her husband's death (*b*). Though this section is in some respects retrospective, it applies only to property of a married woman whose title accrues after the commencement of the Act (*c*). The words in this section, "whether vested or contingent, and whether in possession, reversion, or remainder," do not refer to

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(*t*) Sect. 1, sub-s. 1.

(*u*) See *Re Lumley*, *Ex parte Hood Barrs* v. *Cathcart*, [1896] 2 Ch. 690. In the Law Journal report of this case (65 L. J. Ch. 837) the earlier case of *Hood Barrs* v. *Cathcart* (July 23, 1894), in which this point was decided, is fully cited.

(*x*) *Beasley* v. *Roney*, [1891] 1 Q. B. 509; 60 L. J. Q. B. 408.

(*y*) Sect. 2. See *Re Onslow*, *Plowden* v. *Gayford*, 39 Ch. D. 622; 57 L. J. Ch. 940.

(*z*) Sect. 5.

(*a*) *Re Bowen*, *James* v. *James*, [1892] 2 Ch. 291; 61 L. J. Ch. 432.

(*b*) *Re Cuno*, *Mansfield* v. *Mansfield*, 43 Ch. D. 12.

(*c*) *Re Tucker*, *Emmanuel* v. *Parfit*, 54 L. J. Ch. 874; *Re Adames' Trusts*, 54 L. J. Ch. 878; *Re Hobson*, *Webster* v. *Rickards*, 55 L. J. Ch. 300; *Reid* v. *Reid*, 31 Ch. D. 402; 55 L. J. Ch. 294.

five different kinds of accruer, but to the different kinds of title which, when it accrues after the commencement of the Act, are affected by the section (*d*). A mere *spes successionis* is not a title to property recognized by English law, and a woman who was married before the Act, who has a mere *spes successionis* to property, as one of a class of possible next-of-kin, has not a contingent title within the meaning of this section (*e*).

Her deposits in the Post Office or other savings bank, or in any other bank, annuities, government, or otherwise, sums forming part of the public stocks or funds, and all shares, stocks, debentures, debenture stock, or other interest of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which were standing in a married woman's name on January 1, 1883, shall be presumed, until the contrary be shown, to be her separate property (*f*); and the same presumption holds good with reference to deposits, &c., transferred to her after marriage (*g*); and also to investments (*h*) and stock (*i*), &c., standing in the joint names of a married woman and others, except her husband. If a married woman has made a fraudulent investment with money belonging to her husband, he can reclaim his property (*k*).

Contracts in Respect of Her Separate Property.—A contract entered into by a married woman shall now, *prima facie*, be deemed to be entered into in respect of her separate property (*l*); and shall bind not only the property she has at the date of the contract, but that which she may subsequently acquire (*m*). The Act is not retrospective as to her contracts and engagements (*n*); and any judgment against a married woman on a contract made before the Act could only be enforced against such property as she possessed at the date of the contract and judgment (*o*).

(*d*) *Reid* v. *Reid* (*ubi sup.*).

(*e*) *Re Parsons*, *Stockley* v. *Parsons*, 45 Ch. D. 51; 45 L. J. Ch. 51; *Re Mudge*, [1914] 1 Ch. 115; 83 L. J. Ch. 243.

(*f*) Sect. 6.

(*g*) Sect. 7.

(*h*) Sect. 8.

(*i*) Sect. 9.

(*k*) Sect. 10.

(*l*) Sect. 1, sub-s. 3; repealed by Married Women's Property Act, 1893.

(*m*) *Ibid.* sub-s. 4; repealed by Married Women's Property Act, 1893.

(*n*) *Davies* v. *Stanford*, 61 L. T. 234.

(*o*) *Turnbull* v. *Forman*, 15 Q. B. D. 234; 54 L. J. Q. B. 489; *Davies* v. *Stanford* (*ubi sup.*).

Civil and Criminal Remedies.—She has civil and criminal remedies (which she can bring alone) against strangers, for the security and protection of her property (*p*); she had also civil remedies against her husband, and can sue him for a tort done to her separate property; and can even prosecute him criminally for an act which amounts to a larceny of her property when deserting or about to desert her (*q*).

Existing Settlements.—Existing settlements between husbands and wives are preserved, and the power to make future settlements is expressly reserved; restraint upon anticipation is preserved, except that a woman on marriage cannot deprive herself of the right to alienate her property so as to defeat her ante-nuptial creditors (*r*). The legal personal representative of a married woman shall, in respect of her separate estate, have the same rights and liabilities, and be subject to the same jurisdiction as she would be if she were living (*s*).

General Effect of Married Women's Property Act, 1882.—The general effect of the law on this subject now is that a married woman is absolutely independent of her husband in regard to her property; she can deal with it and dispose of it as she pleases, and can even exclude and restrain him, at least by interim injunction pending divorce proceedings, from entering into a house belonging to her in which she is living (*t*). The Act does not take away from a husband who was married to his wife previously to its commencement any property which may, under the old law, have come to him *jure mariti*, but only prevents his rights from attaching and being exercised over property of his wife, whose title to it shall accrue after the date of its operation. It also prevents, in the case of spouses married after it came into force, the marital right attaching in the future to any property acquired by married women. The full benefit of the Act will not in all cases be experienced by women married before its commencement in respect of property which accrues to them after its commencement. Thus, where on their marriage they have covenanted to bring into settlement property above a certain amount *and not settled to their separate use*, and after the commencement of the Act property above the specified amount comes to them by deed or will, without any

(*p*) *Weldon* v. *De Bathe*, 14 Q. B. D. 339; 54 L. J. Q. B. 113.
(*q*) Sect. 12. And see Larceny Act, 1916, s. 36.
(*r*) Sect. 19. See *Jay* v. *Robinson*, 25 Q. B. D. 467; 59 L. J. Q. B. 367.
(*s*) Sect. 23.
(*t*) *Symonds* v. *Hallett*, 24 Ch. 346; 53 L. J. Ch. 60.

direction that it should be to their separate use, they are bound by their covenant to bring it into settlement, and their trustees are entitled to claim it, because though the fifth section of the Act attaches to such property the statutory separate use, yet section 19, which preserves existing settlements, overrides the effect of the earlier section (*u*).

At a rough glance this Act would seem to render a married woman perfectly free and independent of her husband, and to clothe her in every respect with all the powers and freedom of a single woman. But on closer inspection this will be found not to be the case, but that she has by the statute a power exercisable by her over all kinds of property, which formerly could only be exercised by her in respect of property which was recognized by equity to be her separate property, or in respect of limited classes of property made separate estate by the legislation of 1870; in return for these extended powers her liabilties are considerably enlarged. Its effect is not so far-reaching as that of the Divorce Act of 1857 in constituting the married woman who is judicially separated a *feme sole*. That Act (*x*) goes to the length of providing that on the death of a married woman who is judicially separated, her property shall, in case she die intestate, go as it would have gone *if her husband had been then dead*—that is, his marital rights were abrogated *in toto*; and neither during her life nor after her death had they any existence.

Section 3.

Power of Disposition over Separate Estate.

When equity gave a married woman an interest in her property, unaffected by any marital right or control, it conferred upon her the *jus disponendi* in respect of that property (*y*); and it has been a long-established rule that a *feme covert*, acting with respect to her separate property, is competent to act in all respects as a *feme sole* (*z*). A married woman, then, unless the intention that she shall not alienate is evident (and such intention must be clearly expressed), is entitled to deal with such property as she pleases *inter vivos* or by will (*a*).

(*u*) *Re Stonor's Trusts*, 24 Ch. D. 195; 52 L. J. Ch. 776.
(*x*) Sect. 25. See *ante*, p. 216.
(*y*) *Fettiplace* v. *Gorges*, 1 Ves. 48.
(*z*) *Peacock* v. *Monk*, 2 Ves. Sen. 191 (decided 1750); *Hulme* v. *Tenant*, 1 Bro. C. C. 16 (decided 1778).
(*a*) *Rich* v. *Cockell*, 9 Ves. 369.

This section will thus be divided: (a) Disposition *inter vivos*—(i) as to real estate; (ii) as to personal estate. (b) Disposition by will—(i) as to real estate; (ii) as to personal estate. (c) Powers of appointment.

(a) Disposition Inter Vivos. (i) Real Estate.—A married woman has long possessed the power of alienating the equitable interests in her estates in fee so as to bind her heirs, and to defeat her husband's interests, without his consent and the necessity of having recourse to the process of levying a fine or suffering a recovery, or a deed acknowledged under 3 & 4 Wm. IV. c. 74, and without an express power of appointment; and unless she was restrained from anticipating she might dispose of and deal with her property without the concurrence of her trustees (*b*). This was so laid down in the case of *Taylor* v. *Meads* (*c*), in which a testator had devised real estate in fee to trustees upon trust for a married woman for her separate use. Lord Westbury there held that she had the power to dispose of it as a *feme sole*, apart from the control and interference of her husband; and that if his consent or concurrence in the act or instrument of disposition were required, the wife would be subjected to his control and interference, a proposition which would be contrary to the essence of the separate use. In the course of his judgment his lordship said: "With regard to the question, upon which there has been no decision in the Court below, namely, whether in a case where real estates are conveyed or devised to trustees in fee, upon trust for the sole and separate use of a married woman and her heirs, she has the same power of disposition by deed or will over the equitable fee as she would have if she were a *feme sole*. . . . When the Courts of equity established the doctrine of the separate use of a married woman, and applied it both to real and personal estate, it became necessary to give the married woman, with respect to such separate property, an independent personal status, and make her in equity a *feme sole*. It is of the essence of the separate use that the married woman shall be independent of and free from the control and interference of her husband. With respect to separate property, the *feme covert* is, by the form of trust, released and freed from the fetters and disability of coverture, and invested with the rights and powers of a person who is *sui juris*. To every estate and interest held by a person who is

(*b*) *Grigby* v. *Cox*, 1 Ves. Sen. 517.
(*c*) 34 L. J. Ch. 203.

sui juris the common law attaches a right of alienation; and accordingly the right of a *feme covert* to dispose of her separate estate was recognized and admitted from the beginning until Lord Thurlow devised the clause against anticipation (*d*). But it would be contrary to the whole principle of the doctrine of the separate use to require the consent or the concurrence of the husband in the act or instrument by which the wife's separate estate is dealt with or disposed of. That would be to make her subject to his control and interference." This was followed by Lord Hatherley in *Pride* v. *Bubb* (*e*), where real estate had been vested in trustees for the separate use of a married woman under the provisions of a deed of separation. The effect of her conveyance operates as a direction to her trustees to convey or hold the estate according to the new trust which is created by her direction (*f*).

The power of a married woman over the legal estate settled to her separate use was the same as that over the equitable, and she might dispose of it as though she were a single woman (*g*). Real property acquired by a married woman under the Married Women's Property Act, 1870, is only in the nature of equitable separate estate, so that if she desire to dispose of her legal estate in it *inter vivos* she must conform to the legal method of procedure.

Contingent Interests.—There has been some conflict of opinion as to whether a married woman was formerly able to dispose of a contingent interest in her real property. In one case she was held capable of disposing of it, at any rate in equity, where value had been given. But in an Irish case it was decided that where property was limited to the separate use of a married woman upon a contingency, she could not dispose of it until the contingency happened (*h*). Her disposing power over her contingent or reversionary property is now complete, unless she is restrained from dealing with it.

Full Power of Disposition over Real Estate under Married Women's Property Act, 1882.—By the Married Women's Property Act, 1882, section 1, sub-section 1, and section 2, a woman married after January 1, 1883, who acquires any real property, is rendered capable of holding and disposing of it as her separate

(*d*) See *Parkes* v. *White*, 11 Ves. 209, 221.
(*e*) L. R. 7 Ch. App. 64; 41 L. J. Ch. 105.
(*f*) *Taylor* v. *Meads*, 4 De G. J. & Sm. 597; 34 L. J. Ch. 203.
(*g*) *Hall* v. *Waterhouse*, 13 W. R. 633.
(*h*) *Bestall* v. *Bunbury*, 13 Ir. Ch. Rep. 318, 549.

property as if she were a *feme sole*, without the intervention of any trustee; and if she takes the property without a trustee, both the legal and equitable estate will be vested in her. The law is the same with regard to women married before that date, but who subsequently become entitled to real estate, whether vested or contingent, or in possession, reversion, or remainder (*i*). The joint effect of these sections is to give a married woman ample and full power of disposition over real property that accrues to her, whether she is owner in fee simple, or by barring the estate tail where she is a tenant in tail in possession (*k*). Any valid contract entered into by her in respect of her separate real estate will be specifically enforced against her separate estate (*l*). But she will be protected against fraud, and any contract into which she has been induced to enter by misrepresentation will be set aside as against her (*m*).

Conversion of Property.—Where a woman has been married and acquired real property before the commencement of the Married Women's Property Act, 1882, and has died without electing to treat such property as converted into personalty, or having done any act to effect her equity to a reconversion under the Settled Estates Act, she will be deemed to have left it as real estate (*n*). But if under the Partition Act, 1876 (*o*), an order of the Court is made for the sale of a married woman's share in realty with her consent, or at her request, it will operate as a conversion (*p*). The ordinary principles governing the conversion of property, whether real or personal, belonging to a man will now apply to that of a woman who has been married since the Married Women's Property Act, 1882, came into force; and she would not require to be separately examined; and in an action under the Partition Act her appearance by counsel would be a sufficient request within section 6 of that Act (*q*).

Life Estate.—A married woman has always had the same power over her life interest in real estate settled to her separate use as a single woman; and a contract by her to sell or mortgage her interest has always been enforced against her separate

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(*i*) Sect. 5.
(*k*) *Re Drummond and Davie's Contract*, [1891] 1 Ch. 524; 60 L. J. Ch. 258.
(*l*) *Gaston* v. *Frankum*, 2 De G. & Sm. 561; *Picard* v. *Hine*, L. R. 5 Ch. App. 274.
(*m*) *Knight* v. *Knight*, 11 Jur. (N.S.) 617; 43 L. J. Ch. 611.
(*n*) *Mildmay* v. *Quicke*, 6 Ch. D. 553; 46 L. J. Ch. 667.
(*o*) 39 & 40 Vict. c. 17, s. 6.
(*p*) *Wallace* v. *Greenwood*, 16 Ch. D. 362; 50 L. J. Ch. 289.
(*q*) See *Grange* v. *White*, 18 Ch. D. 612; 37 L. J. Ch. 550.

estate (*r*). The method of disposing of her estate and interest has been already discussed (*s*).

(ii) Personal Estate.—The married woman's power of disposition over her separate personal property has been long recognized in equity. She may dispose of it as a *feme sole* to the full extent of her interest; and she may make a gift in any way and to any person of the property which she has in possession (*t*), or in reversion (*u*). Her non-separate property of a future or reversionary nature she could not dispose of until Malins' Act (*x*), which enabled her to dispose of every future or reversionary interest, whether vested or contingent, in any personal estate to which she or her husband in her right might become entitled under any instrument made after December 31, 1857, except her marriage settlement, or release a power over such personal estate by an acknowledged deed, in which her husband concurred. In an Irish case (*y*) it was held that where property was limited to the separate use of a married woman upon a contingency which had not happened, she could not, pending the contingency, dispose of her interest in the property. This case would probably not have been followed in England, and has been abrogated by the effect of the Married Women's Property Act, 1882 (*z*). She has full power over contingent property, unless restrained from anticipating it, and may charge it by way of mortgage or pledge (*a*), or assign it (*b*). Unless the instrument creating the separate estate expressly provides for the interposition of her trustees in any dealings with it by her, a married woman may exercise her disposing power without their intervention (*c*). If a married woman, possessing this absolute power of disposition, concurs in a breach of trust by her trustees which results in a loss, she cannot, unless restrained from anticipating the fund (*d*), call upon them to replace it (*e*). An exception to the full power of a married woman to dispose of property was the case of a sum ordered by the Divorce Court on dissolution of marriage (*f*) to be paid by the husband for the maintenance of his wife; such sum was a mere personal allowance and not separate estate which could be alienated or

(*r*) *Stead* v. *Nelson*, 2 Beav. 245.
(*s*) See *ante*, chap. VIII.
(*t*) *Fettiplace* v. *Gorges*, 1 Ves. 48.
(*u*) *Sturgis* v. *Corp*, 13 Ves. 190.
(*x*) 20 & 21 Vict. c. 57.
(*y*) *Mara* v. *Manning*, 8 Ir. Eq. 218.
(*z*) Sect. 1, sub-s. 1, sects. 2, 5.
(*a*) *Pybus* v. *Smith*, 1 Ves. 189.
(*b*) *Wagstaff* v. *Smith*, 9 Ves. 520.
(*c*) *Essex* v. *Atkins*, 14 Ves. 542.
(*d*) *Davies* v. *Hodgson*, 27 L. J. Ch. 449.
(*e*) *Crosby* v. *Church*, 3 Beav. 485.
(*f*) Under 29 & 30 Vict. c. 32, s. 1, now repealed.

released by her (*g*). Such money is different from the gross sum or annual sum secured to the wife under section 32 of 20 & 21 Vict. c. 85, which was alienable by her (*h*). The Court now is empowered in the case either of an annual sum or a gross sum to impose restrictions and to order payment to a trustee (*hh*).

Arrears of Separate Income.—She is entitled to recover the arrears of her separate income where she has neither assented to nor acquiesced in the receipt of them by her husband, but if she consents to her husband receiving her income, and they have lived together, she is not entitled to any account of it, either as against the trustee, who may pay it to the husband, or against the husband himself (*i*). Her assent or acquiescence will not be presumed where she was ignorant of his having received the income (*k*). As this assent or acquiescence is the ground for disentitling the wife to recover arrears of dividends, should she become lunatic or incapable of exercising any powers of assent, her husband will be liable to account for any dividends he may have received (*l*). Unless the married woman has been under mental disability she will not be able to recover more than six years of arrears (*m*).

(b) Disposition by Will. (i) Real Estate.—At common law a married woman had no power to make a will of lands. By the Act 32 Hen. VIII. c. 1, she was seemingly permitted to do so; but by the Act passed two years later (*n*), she was expressly debarred from making a valid will of realty. The Wills Act, 1837, (*o*), did not remove her disability, because it prevented her from making a will of lands of which her husband was seised in her right (*p*); and this disability applied to lands in which she had merely an equitable interest. Women married after the Married Women's Property Act, 1882, came into force, may make a valid will of the legal estate of their lands (*q*), and if married before the Act, in respect of the legal estate of lands acquired by them since that date (*r*). The effect of this is inconsistent with, and so by implication repeals, section 14 of 34 & 35 Hen. VIII. c. 5, in so far as it disabled a *feme covert*

(*g*) *Watkins* v. *Watkins*, [1896] P. 222; 65 L. J. P. 75.
(*h*) *Harrison* v. *Harrison*, 13 P. D. 180.
(*hh*) See Supreme Court of Judicature (Consolidation) Act, 1925, s. 190.
(*i*) *Dixon* v. *Dixon*, 9 Ch. D. 587. (*k*) *Ibid.*
(*l*) *Att.-Gen.* v. *Parnther*, 4 Bro. Ch. C. 409.
(*m*) See *Re Hallett*, *Hastings* v. *Hallett*, 35 Ch. D. 94; 56 L. J. Ch. 631.
(*n*) 34 & 35 Hen. VIII. c. 5. (*o*) 1 Vict. c. 26.
(*p*) Sect. 8. (*q*) Sect. 1, sub-s. 1, and sect. 2.
(*r*) Sect. 5.

from making a will of lands; section 8 of 1 Vict. c. 26 is also affected by it. The most usual method by which she was enabled to execute a will valid at common law, was to give her a power of appointment by will over the property to be affected, which she could effectively exercise by way of testamentary disposition (*s*). But if there was no such express power of appointment reserved to her, she could not during coverture dispose by will of the legal estate so as to defeat her heir to whom it descended, subject to the curtesy right (if any) of her husband. The equity courts, however, refused to apply this common law doctrine and the statutory disabilities of a married woman to the real estate settled to her separate use, and recognized her full right to dispose of it by will. It is now settled doctrine that a married woman can dispose of her real estate held by her to her separate use, and that her trustees must hold the legal estate in trust for her devisees (*t*). Her testamentary capacity extends to the legal estate vested in her to her separate use (*u*). But where real estate has been given to a married woman before the coming into operation of the Married Women's Property Act, 1882, and the gift thereof to her separate use extends only to her life interest and not to the *corpus* of the estate, she cannot validly devise the fee (*x*). Such a gift cannot now well be made since January 1, 1883, the date of the passing of that Act.

Her will, where it deals only with realty, but appoints executors, is entitled to probate, where a portion of the estate consists of personalty vested in her by virtue of the Married Women's Property Act, 1882 (*y*).

(ii) Personal Estate.—A married woman was under no statutory disability of making a will of her personalty; but she could not make a valid testamentary disposition, "not merely because marriage was a gift of her personalty to her husband, but because in the eye of the law the wife had no existence separate from her husband, and no separate or contracting power. On this general rule some modifications were engrafted. A married woman who was an executrix had, as such, power to make a will and appoint an executor for the purpose of continuing the representation to the original testator; a married woman might make a will with the consent of her husband;

(*s*) See *post*, p. 354.
(*t*) *Taylor* v. *Meads*, 4 De G. J. & Sm. 597; 34 L. J. Ch. 203.
(*u*) *Hall* v. *Waterhouse*, 13 W. R. 633.
(*x*) *Troutbeck* v. *Boughey*, L. R. 2 Eq. 534; 35 L. J. Ch. 840.
(*y*) *In the Goods of Cubbon*, 11 P. D. 169; 55 L. J. P. 77.

a married woman might make a will in the exercise of a power; and a married woman might make a will disposing of her separate estate or its savings" (*z*). These modifications or exceptions to the above rule still hold good in the case of married women whose testamentary capacity is not affected by the Married Women's Property Act, 1882. Thus, a married woman could make a will of property to which she was entitled *en autre droit*, as executrix; her husband's consent to such will was unnecessary, because he took no beneficial interest in the property (*a*).

In Equity.—In equity a married woman had, as incident to her ownership over it, full testamentary power over personalty settled to her separate use (or which assumed in any way the character of separate estate) (*b*), whether in possession (*c*), or in reversion (*d*), or vested or contingent (*e*). A wife could defeat her husband's interest in her separate personal property by a testamentary disposition; thus, if she made a will of her separate property, and appointed executors who died in her lifetime, the administration with the will annexed was not given to the husband, but to her residuary legatee (*f*).

Statutory Powers.—A married woman acquired under certain statutes the capacity to make a will. Thus, under the Divorce Acts (*g*) a protection order obtained by her put her in all respects as regards her property as though she had obtained a decree of judicial separation, which during the continuance of the separation gave her power to dispose (as well by testament as gift *inter vivos*) of her property acquired since the date of the decree or order, as if a *feme sole*; and if she died intestate, her husband was treated as though dead (*h*). The operation of such order was retrospective, and when made related back to the date of desertion (*i*). So, too, a married woman acquired the right to dispose by will of statutory separate property under the Married Women's Property Act, 1870 (*k*).

Under the Married Women's Property Act, 1882, she has full

(*z*) Per Cairns, L.C., in *Willock* v. *Noble*, L. R. 7 H. L. 580, 589; 44 L. J. Ch. 345.
(*a*) *Scammell* v. *Wilkinson*, 2 East, 552; S. C. *Stevens* v. *Bagwell*, 15 Ves. 139.
(*b*) *Haddon* v. *Fladgate*, 1 Sw. & Tr. 48; 27 L. J. P. 21.
(*c*) *Fettiplace* v. *Gorges*, 1 Ves. 48.
(*d*) *Sturgis* v. *Corp*, 13 Ves. 190.
(*e*) See *Lechmere* v. *Brotheridge*, 32 Beav. 353; 32 L. J. Ch. 577.
(*f*) *Re the Goods of Hine*, L. R. 1 P. & D. 388.
(*g*) 20 & 21 Vict. c. 85, s. 21; and 21 & 22 Vict. c. 108, ss. 6-10.
(*h*) 20 & 21 Vict. c. 85, s. 25.
(*i*) *In the Goods of Elliott*, L. R. 2 P. & M. 274; 40 L. J. P. M. & A. 76.
(*k*) 33 & 34 Vict. c. 93, s. 1.

disposing power over property acquired by her under the Act as though she were a single woman (*l*), and her trustee (if any) will, as in the case of her realty, hold the property in trust to carry out her directions. A will made by a married woman during coverture, disposing of separate property over which she has full testamentary control, will no longer need the assent of her husband to its probate if he survive, nor re-execution on her part if made during coverture and before the Act came into force in order to pass separate property acquired by her under the provisions of the Act; and her death in her husband's lifetime is immaterial (*m*).

Testamentary Capacity Limited to Separate Property.—The testamentary capacity of a married woman was limited to her separate property, and whatever was not separate property did not pass; therefore property acquired by a married woman after she became discovert did not pass unless she republished her will made during coverture, notwithstanding the provisions of section 24 of the Wills Act, 1837 (*n*). So, too, section 1, sub-section 1, of the Married Women's Property Act, 1882, gave a married woman power to dispose by will only of property of which she was possessed while under coverture; her will, therefore, unless it was re-executed or republished after she became discovert, was ineffectual to pass property acquired by her after coverture had come to an end; and section 24 of the Wills Act did not apply to a will made by her under the Act of 1882 (*o*). But the Act of 1882 did not confer upon her the power of disposing within the Mortmain Act of 1803 (*p*) of five acres of land and £500 personalty for church-building purposes without her husband's consent (*q*).

Under Married Women's Property Act, 1893.—But a complete alteration in this branch of the law has been effected by the Married Women's Property Act, 1893 (*r*), by which section 24 of the Wills Act, 1837, is made to apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it; and her will will not require to be re-executed or re-published

(*l*) Sect. 1, sub-s. 1, and sect. 5.
(*m*) *Re Bowen, James* v. *James*, [1892] 2 Ch. 291; 61 L. J. Ch. 432.
(*n*) *Willock* v. *Noble*, L. R. 7 H. L. 580; 44 L. J. Ch. 345.
(*o*) *Re Price, Stafford* v. *Stafford*, 28 Ch. D. 709; 54 L. J. Ch. 509; *Re Young, Trye* v. *Sullivan*, 28 Ch. D. 705; 54 L. J. Ch. 1065; *Re Cuno, Mansfield* v. *Mansfield*, 43 Ch. D. 12; *Re Smith, Bilke* v. *Roper*, 45 Ch. D. 632.
(*p*) 43 Geo. III. c. 108.
(*q*) *Re Smith's Estate, Clements* v. *Ward*, 35 Ch. D. 589; 56 L. J. Ch. 726.
(*r*) 56 & 57 Vict. c. 63, s. 3.

after the death of her husband. Her will in the future will speak as from her death, and will not require any validation by republication or re-execution on the cessation of her coverture to pass non-separate property, that is, property acquired by her while discovert. This alteration of the law affects the will of every married woman who has died since this Act came into force (*s*).

Practice of Probate Court.—The Court of Probate formerly required some evidence of the possession of separate estate in order to found testamentary capacity on the part of the woman (*t*). The presumption existing before the Act of 1882, that a married woman possessed no separate property, is done away with, and the contrary presumption that she does possess it will now hold good in the case of the will of a married woman as in that of a *feme sole* or a man (*u*). Whether the Court will take upon itself to decide of what the separate property consists seems doubtful. In one case (*x*) the late Sir George Jessel was of opinion that if all the interested parties were before the Court, the latter might take upon itself to decide the question; but in a later case (*y*), Butt, J., held that the Court of Chancery was the proper Court for the decision of that question. It was the former practice of the Court to direct a limited grant of letters of probate of a married woman's will to such property as the testatrix had a right to dispose of; and her husband had the right to have a grant of administration *cæterorum* (*z*); but since the Married Women's Property Act, 1882, it is the practice to make the grant "general," that is, to such property as she has disposed of by her will (*a*). The effect of the general probate is only to enable the executor to get in all the assets of the wife, whether she had the power to dispose of them by will or not; and it does not affect the husband's beneficial title to the wife's choses in action, but the executor is a trustee for the husband, who is entitled to have them transferred to him, subject, however, to any deductions in respect of debts and other liabilities contracted by the wife (*b*). A grant to a husband

(*s*) *Re Wylie, Wylie* v. *Moffatt*, [1895] 2 Ch. 116; 64 L. J. Ch. 613.
(*t*) See *Barnes* v. *Vincent*, 5 Moo. P. C. 201; *Haddon* v. *Fladgate*, 27 L. J. P. M. & A. 21.
(*u*) *Harding* v. *Sutton*, 59 L. T. 838.
(*x*) *Re the Goods of Tharp*, 3 P. D. 76.
(*y*) *Harding* v. *Sutton* (*ubi sup.*). (*z*) *Brenchley* v. *Lynn*, 2 Rob. 441.
(*a*) *In the Goods of Price*, 12 P. D. 137; 56 L. J. P. 72; *In the goods of Homfray*, 12 P. D. 138; *In the Goods of Williams*, 67 L. T. 502. See the New Rules of Practice, 15 and 18.
(*b*) *Smart* v. *Tranter*, 43 Ch. D. 587; 59 L. J. Ch. 363.

of probate of his wife's will since the new rules of practice came into force does not operate as an assent by him to the will as a disposition of property which was not her separate property, and over which she had no power of appointment (*c*). But it seems still the practice that, where a woman has been married before the Married Women's Property Act, 1882, came into force, who before her marriage became possessed of a mortgage debt which has not been reduced into possession by her husband, and has made a will purporting to dispose (*inter alia*) of this particular chose in action, the Court will still make a grant of limited administration to the husband of such property as his wife had no power to dispose of by will (*d*). It would seem that where a married woman's will amounts to no more than an exercise of a power of appointment the Court will grant to the appointee as administrator with the will annexed only a limited administration, unless her husband's consent is obtained (*e*).

Course of Administration.—If a married woman leave a will and make bequests, the usual course of administration as laid down in Part II. of the first Schedule to the Administration of Estates Act, 1925 (*f*), will be observed. Thus, in the payment of her debts, the undisposed-of interest will be first applied, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies, then property included in a residuary gift subject to a similar retention, next property appropriated or devised or bequeathed subject to the payment of debts, next property charged with payment of debts. After these come in order, the fund to meet pecuniary legacies, specific devises or bequests, and property appointed under a general power. General legacies will, it is presumed, as in the ordinary case, carry interest, not from the death of the testator, but from the expiration of one year after the death.

(c) Powers of Appointment.—Another mode by which married women could exercise a disposing power over their property was the execution of powers of appointment conferred upon them by the instrument creating their interest in the property. A power over the income of property extends as a

(*c*) *Re Atkinson, Waller* v. *Atkinson*, [1899] 2 Ch. 1; 67 L. J. Ch. 349. Rules 15 and 18 of Probate Rules. (Non-contentious Business); and see *Elliot* v. *North*, [1901] 1 Ch. 424; 70 L. J. Ch. 217.

(*d*) *In the Goods of Leman*, [1898] P. 215; 67 L. J. P. 100; and see *In the Goods of Donovan*, 78 L. T. 567.

(*e*) *In the Goods of Tréfond*, [1899] P. 247; 68 L. J. P. 82.

(*f*) 15 Geo. V. c. 23.

rule over the capital (*g*). This power of appointing gave them large control over their property; thus, if it was intended that a married woman by exercising a power should take property out of settlement, she was enabled to do so (*h*).

Powers are either common law powers, or equitable powers, or powers which derived their efficacy from the Statute of Uses, now repealed by the Law of Property Act, 1925, which provides (*i*) that after January 1, 1926, "the provisions in any statute or other instrument requiring land to be settled to uses shall (subject to creating or reserving thereout any legal estate authorised by the Act which may be required) be conveyed to a person of full age upon the requisite trusts." The statute also provides (*k*) that the repeal of the Statute of Uses (as amended) is not to affect the operation thereof in regard to dealings taking effect before January 1, 1926. A common law power enables the donee to pass the legal estate, and it is the execution, not the creation of the power, which effects the transmutation of the estate. An equitable power is that which is enforceable only in equity, that is, where the legal interest is vested in one person, but the power of disposing of the beneficial interest is in another. A power under the Statute of Uses was a power of revoking existing, or declaring future, uses vested in some person named for that purpose in the deed by which the uses to be affected by the operation of the power were created (*l*).

Powers are also general or limited. A general power is one where no limit is placed on the donee's choice of objects. A limited or special power is one the objects of which are specified persons or classes (*m*).

A power, too, may be either collateral, which is nothing more than a bare authority given to a stranger to deal with an estate, no interest in which is vested in the donee of the power; or it may be coupled with an interest, that is, a power to deal with an estate in which the donee is beneficially entitled (*n*). It may also be in gross (*o*), or appendant (*p*).

A power of appointment may be exercised over both real and

(*g*) See *Re L'Herminier, Mounsey* v. *Buston*, [1894] 1 Ch. 675; 63 L. J. Ch. 496.
(*h*) *Re Pinède's Settlement*, 12 Ch. D. 667; 48 L. J. Ch. 741.
(*i*) 15 Geo. V. c. 20, s. 1 (9).
(*k*) Sect. 1, sub-s. 10.
(*l*) Farw. 1-3.
(*m*) *Ibid.* 7.
(*n*) See *Dickenson* v. *Teesdale*, 1 De G. J. & S. 60.
(*o*) *Re D'Angibau, Andrews* v. *Andrews*, 15 Ch. D. 228; 49 L. J. Ch. 756.
(*p*) *Ibid.*

personal property, either by deed or will (*q*), and in her own favour (*r*); or in that of her husband (*s*); or in favour jointly of herself and husband (*t*). If the power is exercised by will the property affected by it is properly receivable, as the case may be, either by her executor (*u*), or her administrator with the will annexed (*x*).

Where the power of appointment was exercisable by will, it enabled a married woman to dispose of property which she could not otherwise have disposed of, as, for instance, realty, which she could not dispose of by will, but only by levying a fine, or by deed.

Concurrence Unnecessary.—A married woman as donee could exercise any of these powers without the consent or concurrence of her husband, and she could validly appoint to him as to a stranger, though in the latter case the Court regarded the appointment with some jealousy (*y*). She may execute a power, whether appendant, in gross, or simply collateral, and over copyhold as well as freehold property (*z*).

Exercise by Infant.—As an infant a married woman cannot exercise a power by will, but by deed she can, if the instrument of donation expressly confers upon her the right and capacity to exercise it during minority; and there is no distinction drawn in this respect between realty and personalty, and between powers collateral and powers coupled with an interest (*a*). No precise form of words is necessary to create a power if the intention to do so is clear (*b*).

Release of Power.—A married woman may release her power of appointment over realty, whether acquired before or since the coming into force of the Married Women's Property Act, 1882, by deed. So, too, if it is a power over a future or reversionary

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(*q*) Farw. pp. 116 *et seq.* See *Willoughby Osborne* v. *Holyoake*, 22 Ch. D. 238; 52 L. J. Ch. 231.

(*r*) See *Brownrigg* v. *Pike*, 7 P. D. 61; 51 L. J. P. 29.

(*s*) See *Re Hernando, Hernando* v. *Sawtell*, 27 Ch. D. 284; 53 L. J. Ch. 865.

(*t*) *Wood* v. *Wood*, L. R. 10 Eq. 220; 39 L. J. Ch. 790.

(*u*) *Re Hoskin's Trust*, 6 Ch. D. 281; 46 L. J. Ch. 817.

(*x*) *Re Peacock's Settlement, Kelcey* v. *Harrison*, [1902] 1 Ch. 552; 71 L. J. Ch. 325.

(*y*) Farw. 8.

(*z*) Sugd. Pow. 153, 154.

(*a*) *Re Cardross's Settlement*, 7 Ch. D. 728; 47 L. J. Ch. 327. In this case Jessel, M.R., laid it down that the comment of Mr. Preston on the judgment of Lord Hardwicke in *Hearle* v. *Greenbank* (3 Atk. 695), to the effect that an infant may execute a power even though coupled with an interest, if from the nature of the power it be evident that it was in the contemplation of the author of the power that it should be exercised during minority, is good law. See also *Re D'Angibau* (*ubi. sup.*).

(*b*) *Berchtoldt* v. *Hertford*, 7 Beav. 172.

interest in personal estate, and she may also release or contract to release by deed a power over personalty vested in possession under the Conveyancing and Law of Property Act, 1881 (*c*). This latter Act is now practically entirely repealed by the Law of Property Act, 1925 (*d*), which provides in the simplest and widest terms (*e*) that a person to whom any power, whether coupled with an interest or not, is given may by deed release, or contract not to exercise, the power. The latter Act further enacts (*f*) that a person to whom any power, whether coupled with an interest or not, is given may by deed disclaim the power, and, after disclaimer, shall not be capable of exercising or joining in the exercise of the power. If it is a power over personal estate of a future or reversionary interest which accrued to her before the passing of the Act of 1882, she must release it by deed according to the provisions of Malins' Act, 1857; but if it has accrued since the passing of the Act of 1882, she may release it as though she were a *feme sole*. She may also release, or contract to release, by deed, a power over personalty vested in possession under the Conveyancing and Law of Property Act, 1881 (*c*). Where a bequest of income was made before the Married Women's Property Act, 1882, came into force to a woman for her life for her separate use, and of the capital for such persons as she should appoint, and in default of appointment for her executors, administrators, or assigns, and she married after the Act came into force, her life interest and reversionary interest were held to be alike limited to her separate use, and so on releasing her power she became absolutely entitled to the fund (*g*).

Limitation Operating as an Absolute Gift.—A limitation of an estate or fund to the separate use of a married woman for her life, with remainder as she shall, notwithstanding her coverture, by deed or will appoint (that is, by execution of a general power of appointment), and in default of appointment, to her executors and administrators, operates as an absolute gift of the *corpus* to her sole and separate use (*h*); and the absolute

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(*c*) 44 & 45 Vict. c. 41, s. 52, sub-s. 1. *Re Chisholm's Settlement; Re Hemphill's Settlement, Hemphill* v. *Hemphill*, [1901] 2 Ch. 82; 70 L. J. Ch. 533.

(*d*) 15 Geo. V. c. 20.

(*e*) Sect. 155.

(*f*) Sect. 156.

(*g*) *Re Davenport, Turner* v. *King*, [1895] 1 Ch. 361; 64 L. J. Ch. 252. In this case the decision in *Whittle* v. *Henning* (2 Ph. 731) on a similar point was held applicable. See *Re Onslow, Plowden* v. *Gayford*, 39 Ch. D. 622; 57 L. J. Ch. 940.

(*h*) *London and Chartered Bank of Australia* v. *Lemprière*, L. R. 4 P. C. 572; 42 L. J. P. C. 49.

interest in the property is conferred upon her alike in cases where the power precedes as where it succeeds the life estate (*i*).

Exercise of a General Power by Will.—The exercise of a general power by will by a married woman has the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under the Act of 1882 (*k*). Where a married woman possesses property over which she has a general testamentary power of appointment, and she directs the executors of her will to pay the debts, such debts are a charge upon the property (*l*). Property appointed by her by will under a general testamentary power becomes on her death liable for her debts and other liabilities, even though she may have had no separate estate at the time she contracted them (*m*). The effect of the exercise of a general testamentary power becomes operative on her death, and not from the date of the instrument conferring the power upon her (*n*).

Section 4.

Restraint upon Anticipation.

Restraint upon anticipation, which is a modification of the separate estate, prevents a married woman from alienating or disposing of her property during coverture (*o*). It is applicable both to real and personal estate (*p*). The restraint is as much a violation of the principles of the law that an independent person (and a married woman is so far as concerns her separate property *sui juris*) may dispose of property belonging to him, as the doctrine of the separate estate is a violation of the common law theory that the property of the wife belongs to the husband, whether during coverture or for his life, or absolutely (*q*). Equity created the separate estate, and was entitled to mould and shape its own production; and it claimed full power to limit and control the effect of that new interest which it had called into being. The doctrine of the separate use gave a married

(*i*) *Mayd* v. *Field*, 3 Ch. D. 587; 45 L. J. Ch. 699.
(*k*) 45 & 46 Vict. c. 75, s. 4.
(*l*) *Re De Burgh Lawson, De Burgh Lawson* v. *De Burgh Lawson*, 41 Ch. D. 568; 58 L. J. Ch. 561.
(*m*) *Re Ann, Wilson* v. *Ann*, [1894] 1 Ch. 549; 63 L. J. Ch. 334. See *Re Hughes, Brandon* v. *Hughes*, [1898] 1 Ch. 529; 67 L. J. Ch. 279.
(*n*) *Rous* v. *Jackson*, 29 Ch. D. 521; 54 L. J. Ch. 732.
(*o*) *Re Ellis' Trusts*, L. R. 17 Eq. 409; 43 L. J. Ch. 444.
(*p*) *Baggett* v. *Meux*, 7 L. T. (o.s.) 41; *Re Sykes' Trusts*, 6 L. T. 350.
(*q*) *Tullett* v. *Armstrong*, 4 Myl. & Cr. 390, 405.

woman complete dominion over her separate property; she might give it all to her husband, or squander it in contracting unprofitable liabilities. In order to obviate these disadvantages this provision of a restraint upon anticipation was devised by Lord Thurlow in the marriage settlement of a Miss Watson, for whom he was a trustee (*r*). This fetter upon alienation was imposed upon the wife as a protection against her husband, because if she were not debarred from anticipating the proceeds of her separate estate, she might be induced to divest herself of the property, and place it at the disposal of her husband. The validity of this restraint was not at first readily admitted, but its advantage was felt to be real, and it became firmly established; and for many years it has been the practice of conveyancers to insert in wills and settlements a clause restraining a married woman from dealing by way of anticipation with property settled to her separate use (*s*). It is, however, becoming a serious question whether this advantage in favour of married women should be allowed to continue, considering the very broad contractual powers possessed by them. This restraint is capable of being used as a cloak to fraud rather than as a real protection to the woman.

Creation of the Restraint.—Where there is a plain direction that the married woman shall be without the power of anticipating or alienating her property, she will be restrained from dealing with it (*t*). No particular form of words is necessary to create this restraint; and if the intention to restrain anticipation can be clearly collected from the tenour of the instrument it will be sufficient (*u*), whether it is intended to apply generally or to a particular coverture (*x*). But unless the intention to restrain appears, the power of anticipation exists.

The following have been held sufficient to create the restraint: A direction to pay the income to such person as the wife shall by writing, and as the same becomes due, but not by way of assignment, charge, or other anticipation, appoint (*y*); or to pay the income to such persons as the married woman shall,

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(*r*) See *Pybus* v. *Smith*, 1 Ves. 189; *Wagstaff* v. *Smith*, 9 Ves. 520; and *Parkes* v. *White*, 11 Ves. 221.

(*s*) See Hay. Conv. 500-504; Peach. Sett. 284.

(*t*) See *Pybus* v. *Smith* (*ubi sup.*); *Parkes* v. *White* (*ubi sup.*).

(*u*) *Re Ross's Trust*, 1 Sim. (N.S.) 190; 20 L. J. Ch. 293; *Harrop* v. *Howard*, 3 Ha. 624.

(*x*) *Re Gaffee*, 19 L. J. Ch. 179; *Hawkes* v. *Hubback*, L. R. 11 Eq. 5; 40 L. J. Ch. 49.

(*y*) *Brown* v. *Bamford*, 1 Ph. 620.

after it has become due, appoint (*z*); or for her sole, separate, and *inalienable* use (*a*); or a gift of income to her sole and separate use *not to be sold or mortgaged* (*b*); or "receipt by the married woman alone notwithstanding her marriage shall be a good discharge" (*c*); or "the receipt of her (the married woman) for the income be given *after the same shall become due* shall be a good and effectual discharge" (*d*). Where there is an executory trust for the creation of separate estate in the event of a woman marrying, to the effect that she shall enjoy the income during her life for her separate use, the Court can insert a clause against anticipation (*e*). A limitation merely to her sole and separate use, or a direction to pay from time to time upon her receipt under her own proper hand (*f*), or according to her appointment from time to time (*g*); or upon her personal appearance (*h*), for her separate use free from marital control (*i*), will not restrain a married woman from disposing of her property in the fullest possible manner, nor in a will such words after a gift or devise as "it is my *will and request* that she (the married woman) shall not sell or dispose of any part of the property so given or devised" (*k*). A bequest of a fund in trust to be paid to a married woman for her separate use without power of anticipation will be treated as an unfettered gift, if there be no other evidence than the above words that the income only is to be paid to her during coverture (*l*). It depends upon the intention of the donor whether or not restraint upon anticipation attaches to his gift (*m*).

Inoperative as to Single Woman.—The restraint on anticipation is inseparable from and has no independent existence apart from separate estate. "The separate estate may, and often does, exist without the restriction, but the restriction has no independent existence: when found it is as a modification of the

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(*z*) *Field* v. *Evans*, 15 Sim. 375.
(*a*) *D'Oechsner* v. *Scott*, 24 Beav. 239; *Spring* v. *Pride*, 16 Jur. 876.
(*b*) *Steedman* v. *Poole*, 6 Ha. 193; see also *Baggett* v. *Meux*, 7 L. T. (o.s.) 41; *Pybus* v. *Smith* (*ubi sup.*); *Shaw* v. *Shaw*, 1 I. R. 111; *Re Dillon*, *Lowe* v. *Harling*, 50 I. L. T. 144.
(*c*) *Baker* v. *Bradley*, 7 De G. M. & G. 597; 25 L. J. Ch. 7.
(*d*) *Re Smith*, *Chapman* v. *Wood*, 51 L. T. 501.
(*e*) *Re Dunnill's Trusts*, Ir. Rep. 6 Eq. 322.
(*f*) *Ellis* v. *Atkinson*, 3 Bro. C. C. 565; *Sturgis* v. *Corp*, 13 Ves. 190.
(*g*) *Witts* v. *Dawkins*, 12 Ves. 501.
(*h*) *Re Ross's Trust* (*ubi sup.*).
(*i*) *Re Holmes*, *Hallows* v. *Holmes*, 67 L. T. 335.
(*k*) *Hutchins* v. *Burt*, 59 L. T. 490.
(*l*) *Re Fearon*, *Hotchkin* v. *Mayor*, 45 W. R. 232.
(*m*) *Baggett* v. *Meux* (*ubi sup.*); *Re Bown*, *O'Halloran* v. *King*, 27 Ch. D. 411; 53 L. J. Ch. 881.

separate estate, and inseparable from it (*n*); thus, the restraint upon the alienation of income is of no avail unless the income is given to the woman for her separate use (*o*). It is really an anomaly, and a violation of the rule that absolute ownership is inconsistent with restrictions upon it; and equity only permits it because of its limitation to the period of coverture. It accordingly does not affect the right of an unmarried woman to alienate property over which it is created (*p*); thus, where property was settled to the separate use of a woman while unmarried without power of anticipation, it was held that she was, while single, entitled to deal with it, notwithstanding the restraint (*q*). But if she marry, it springs up into effect at once, lapses again into abeyance on her discoverture, whether by death of her husband, or by judicial separation (*r*), or on her obtaining a protection order against her husband (*s*), so far as regards property acquired by her after the decree of separation or order for the protection of her property (*t*), and revives once more on a second marriage (*u*), unless in the interval she has altered the form of investment affected by the original trust, which she is at liberty to do (*x*), or the trust is confined to a particular coverture" (*y*). In the latter case, on a second marriage, it would be necessary for her to stipulate to deprive herself of the power of alienation (*z*). The restraint is limited only to coverture, and does not prevent the married woman from dealing by will with the property subject to it; for her will cannot take effect until coverture has ceased (*a*).

Property Affected by Restraint.—The restraint is applicable to real as well as personal estate (*b*), and may be annexed to a life estate (*c*). As regards personal estate, there has been some

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(*n*) Per Lord Langdale in *Tullett* v. *Armstrong*, 1 Beav. 1.
(*o*) *Stogdon* v. *Lee*, [1891] 1 Q. B. 661; 60 L. J. Q. B. 669.
(*p*) *Re Young's Settlement*, 16 Beav. 199.
(*q*) *Woodmeston* v. *Walker*, 2 Russ. and Myl. 197; *Re Chrimes, Locovich* v. *Chrimes*, [1917] 1 Ch. 30; 86 L. J. Ch. 217.
(*r*) *Munt* v. *Glynes*, 41 L. J. Ch. 639.
(*s*) *Cooke* v. *Fuller*, 26 Beav. 99.
(*t*) *Waite* v. *Morland*, 38 Ch. D. 135; 57 L. J. Ch. 655; *Munt* v. *Glynes* (*ubi sup.*).
(*u*) *Tullett* v. *Armstrong* (*ubi sup.*).
(*x*) *Wright* v. *Wright*, 2 J. & H. 647; see also converse case of *Newlands* v. *Paynter*, 4 Myl. & Cr. 408.
(*y*) *Moore* v. *Morris*, 4 Dr. 33.
(*z*) See 45 & 46 Vict. c. 75, s. 19, and *ante*, chap. vi., Marriage Settlements, p. 106.
(*a*) See *Re Hernando, Hernando* v. *Sawtell*, 27 Ch. D. 284; 53 L. J. Ch. 865.
(*b*) *Baggett* v. *Meux*, 7 L. T. (o.s.) 41; *Re Sykes' Trusts*, 6 L. T. 350.
(*c*) *Re Lumley, Ex parte Hood Barrs*, [1896] 2 Ch. 690; 65 L. J. Ch. 837. See *Re Williams, Williams* v. *Grant*, 76 L. T. 150.

difference of judicial opinion under what circumstances the restraint shall operate (*d*). It has been laid down as a rule or test that where the fund is income-bearing, then the restraint operates; but where it is not income-bearing, as a mere sum of cash, the restraint does not take effect; but the married woman is entitled to have the money paid to her notwithstanding her coverture. But the real question is what was the intention of the settlor or testator; and whether the restraint on anticipation is effectual or not does not depend upon the question whether the gift is of an income-bearing fund or of a sum of cash, but whether the settlor or testator has shown an intention that the trustees should keep the investment and pay the income to the married woman (*e*). In other words, it is really a question of construction, and where the donor means the fund to be paid over to the woman whether single or under coverture, any expression fettering her absolute power over it will be ineffectual (*f*). Where a testator having a general power of appointment over a settled fund appointed that a sum of £1,500 should be raised and paid to his daughter, a married woman, absolutely for her separate use *without power of anticipation*, and appointed one-fourth of the residue of the fund to be held on trust for her, absolutely for her separate use *without power of anticipation*, it was not contended that the married woman was not entitled to the immediate payment of the £1,500, but she was held not entitled to payment out of the capital of her fourth share of the residue (*g*). Where a fund subject to a particular estate is given absolutely to a married woman with a restraint upon anticipation, the restraint will not, in the absence of any other ground, be confined to the continuance of that particular estate (*h*). So, too, where a testator directed surplus income of real and personal estate to be accumulated during the life of his wife, and after her death gave the capital to his children,

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(*d*) *Re Sykes' Trusts* (*ubi sup.*); *Re Ellis' Trusts*, L. R. 17 Eq. 409; 43 L. J. Ch. 444; *Re Croughton's Trusts*, 8 Ch. D. 460; 47 L. J. Ch. 79; *Re Benton, Smith* v. *Smith*, 19 Ch. D. 277; 51 L. J. Ch. 185; *Re Clarke's Trusts*, 21 Ch. D. 748; 51 L. J. Ch. 855; *Re Taber's Estate, Arnold* v. *Kayess*, 46 L. T. 305; *Re Coombes, Coombes* v. *Parfitt* (1883), W. N. 169.

(*e*) *Re Bown, O'Halloran* v. *King*, 27 Ch. D. 411; 53 L. J. Ch. 881. In this case the Court of Appeal approved of *Re Ellis' Trusts* (*ubi sup.*), and *Re Croughton's Trusts* (*ubi sup.*), and disapproved of part of the decision of Fry, J., in *Re Clarke's Trusts* (*ubi sup.*).

(*f*) *Re Holmes, Hallows* v. *Holmes*, 67 L. T. 335; *Re Bown, O'Halloran* v. *King* (*ubi sup.*).

(*g*) *Re Grey's Settlements, Acason* v. *Greenwood*, 34 Ch. D. 712; 56 L. J. Ch. 511.

(*h*) *Re Tippet's and Newbould's Contract*, 37 Ch. D. 444.

directing that the shares of his daughters should be for their separate use, without power of alienation or anticipation during his wife's life, the married daughters were held during their mother's lifetime entitled to receive only the income of invested income (*i*). A settlement of property to the use of a married woman without impeachment of waste is not inconsistent with a restraint upon anticipation (*k*). Where a married woman has real estate settled on her with a restraint upon anticipation of the income only, she has control over the *corpus*, so far as such control or disposition does not deprive her of the income (*l*).

Restraint Preserved by Married Women's Property Act, 1882.—The restraint upon anticipation is preserved as a necessary protection of the interests of the wife by section 19 of the Married Women's Property Act, 1882, which enacts that "nothing in this Act . . . shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument." But the section goes on to provide that "no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors" (*m*). This places a married woman on an equal footing with a man or an unmarried woman in respect of settlements that may be impeached under the enactments relating to voluntary conveyances in fraud of creditors, or set aside under the Bankruptcy

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(*i*) *Re Spencer, Thomas* v. *Spencer*, 30 Ch. 183; 55 L. J. Ch. 80.

(*k*) *Re Lumley, Ex parte Hood Barrs*, [1896] 2 Ch. 690; 65 L. J. Ch. 837.

(*l*) *Cooper* v. *Macdonald*, 7 Ch. D. 288; 47 L. J. Ch. 373.

(*m*) See form of judgment against a married woman in *Scott* v. *Morley*, 20 Q. B. D. 120; 57 L. J. Q. B. 43. "The restraint on anticipation is an anomaly introduced by the Court of Chancery for the protection of the married woman against her own act and her own weakness. She cannot override it by any engagement entered into by her, however solemn, or however much to her particular advantage in the circumstances of the case; and, on the other hand, it has been frequently held that the court cannot make her separate income restrained from anticipation liable to redress a fraud committed by her, however gross. . . . So far from modifying the effect of the restraint as it existed before the Act (Married Women's Property Act, 1882), it appears to us that the Act carefully preserves it to the same extent as it existed previously." Per Davey, L.J., in *Hood Barrs* v. *Cathcart*, [1894] 2 Q. B., at p. 566; 63 L. J. Q. B. 602. See *Softlaw* v. *Welch*, [1899] 2 Q. B. 419; 68 L. J. Q. B. 940.

law, if she is a trader. Thus, a married woman who contracts a debt, then becomes discovert and marries again, cannot make a valid settlement of her property on the second marriage as against her creditor by restraining herself against anticipation. Such creditor is deemed to be an ante-nuptial one; and the effect of this section is to prevent the restraint having any efficacy as against the ante-nuptial debt (*n*), and though the debt merges in the judgment the debt is still regarded as an ante-nuptial debt (*o*). But if she has contracted a debt and has subsequently married, settling her own property on herself with a restraint against anticipation, such restraint will have effect given to it, if at the date of the settlement she had no intention to defeat or delay creditors (*p*). The words "interfere with or affect" mean invalidate or render inoperative (*q*); thus, where a married woman who carried on a trade and became bankrupt had executed a marriage settlement by which she conveyed certain real property to a trustee in trust for herself for life for her separate use without any restriction on anticipation with certain remainders, it was held that her trustee in bankruptcy in claiming her life estate was not interfering with or affecting the settlement within the meaning of this section, but rather was claiming under and in affirmance of its provisions (*r*). Where a woman settles her own property on herself in view of marriage, any restriction on anticipation in any settlement or agreement for a settlement will not prevent her property from being taken to satisfy her ante-nuptial debts or liabilities, or in respect of her ante-nuptial torts (*s*).

Restraint Imposed by Stranger.—Where the restraint is imposed by a stranger on his gift, it will be as valid now as heretofore, and the property so restricted will be out of the reach of the married woman's creditors, ante-nuptial as well as post-nuptial (*t*), subject to the power now given to the Court in

(*n*) *Jay* v. *Robinson*, 25 Q. B. D. 467; 59 L. J. Q. B. 367.

(*o*) *Rothschild* v. *Fisher*, [1920] 2 K. B. 243; 89 L. J. K. B. 521.

(*p*) See *Hemingway* v. *Braithwaite*, 61 L. T. 224. See *ante*, p. 134.

(*q*) *Re Armstrong, Ex parte Boyd*, 21 Q. B. D. 264; 57 L. J. Q. B. 553; *Re Whitaker, Christian* v. *Whitaker*, 34 Ch. D. 227; 56 L. J. Ch. 251; *Hancock* v. *Hancock*, 38 Ch. D. 78; 57 L. J. Ch. 396.

(*r*) *Re Armstrong, Ex parte Boyd* (*ubi sup.*).

(*s*) This is a legislative sanction of the decision in *Sanger* v. *Sanger*, L. R. 11 Eq. 470; 40 L. J. Ch. 372.

(*t*) Under the Married Women's Property Act, 1870, s. 12, it has been held that a married woman's property, though subject to the restraint, was liable to satisfy her ante-nuptial debts. *Axford* v. *Reid*, 22 Q. B. D. 548; 58 L. J. Q. B. 230; *Re Hedgley, Small* v. *Hedgley*, 34 Ch. D. 379; 56 L. J. Ch. 726. The effect of these cases would be limited to women married during the period the Act was in force.

Bankruptcy of ordering part of the income of a married woman trader to be paid to the trustee for the creditors (*u*).

Restraint Preserved by Married Women's Property Act, 1893.—The effect of restraint is also preserved by the Married Women's Property Act, 1893 (*x*), which provides that nothing shall render available to satisfy any liability or obligation arising out of contract any separate property which at the time of entering into the contract or afterwards a married woman is restrained from anticipating.

Disclaimer.—A married woman may disclaim a gift of personal estate although it is given with a restraint on anticipation (*y*), and under the Law of Property Act, 1925, s. 168, may disclaim any estate or interest in land, with or without the concurrence of her husband, as the case may require.

Operation of Restraint.—Where a married woman whose property is subject to a restraint upon anticipation brings an action by her next friend not under the Married Women's Property Act, 1882, which is found to be an improper one, and costs are given against the next friend, who cannot pay them, she cannot be ordered to pay the costs out of such property, though it includes arrears of income accrued due before the order for payment, but after the commencement of the proceedings (*z*). In *Cox* v. *Bennett* (*a*) (which was a suit under the Married Women's Property Act, 1882) a married woman's trustees, against whom she brought an unsuccessful suit without a next friend, were held by the Court of Appeal entitled to retain the costs of the suit out of a balance of income, which was in their hands at the time when the order to pay costs was made, though it was not in hand at the time when she commenced the proceedings, on the ground that the restraint on anticipation had ceased as to any sums that formed part of the income as soon as they came into the hands of the trustees. But the correctness of that decision was not wholly acquiesced in by a differently constituted Court of Appeal in *Hood Barrs* v. *Cathcart* (*b*), which laid down that where a married woman has separate estate restrained from anticipation, the Married Women's Property Act, 1882, does not enable a judgment to be enforced against arrears of income to which the restraint applies, accruing due after the

(*u*) Bankruptcy Act, 1914, s. 52.
(*x*) 56 & 57 Vict. c. 63, s. 1, proviso.
(*y*) *Re Wimperis, Wicken* v. *Wilson*, [1914] 1 Ch. 502; 83 L. J. Ch. 511.
(*z*) *Re Glanvill, Ellis* v. *Johnson*, 31 Ch. D. 532; 55 L. J. Ch. 325.
(*a*) [1891] 1 Ch. 617; 60 L. J. Ch. 651.
(*b*) [1894] 2 Q. B. 559, 563; 63 L. J. Q. B. 602.

date of the judgment, either by the appointment of a receiver, by sequestration, by a charging order, or by any kind of process, even where such income is in her own hands (*c*); and the Court will refuse to enforce a judgment against arrears of separate income which have not come into the married woman's hands (*d*).

Restraint Removable under Married Women's Property Act, 1893.—The Married Women's Property Act, 1893 (*e*), has effected an alteration in this respect by enabling the Court before which any action or proceeding instituted by a woman [*sic*], or by a next friend on her behalf, is pending, to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation; and such payment may be enforced by the appointment of a receiver and the sale of the property or otherwise (*f*). This provision, however, does not give the Court jurisdiction to make an order for the payment of costs of a suit begun before the Act came into force (*g*); nor does it apply to the costs of a petition (*h*), or an appeal instituted by a married woman without a next friend in a suit in which she was the original defendant (*i*); or to any proceedings in which she is defendant, though her act has been the cause of their institution, such as the entry of a *caveat* by her against the grant of probate of a will (*k*). But it does apply to an unsuccessful application for a new trial of an action originally instituted by her (*l*); also to a counterclaim set up by her in an action brought against her; this being a "proceeding instituted" by her within the meaning of this Act (*m*), and to an intervention on her part in a probate suit in which she adopts the pleadings of the plaintiff (*n*); and to the costs of a

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(*c*) See also *Re Lumley, Ex parte Hood Barrs*, [1894] 3 Ch. 135; 63 L. J. Ch. 897.

(*d*) *Loftus* v. *Heriot*, [1895] 2 Q. B. 212; 64 L. J. Q. B. 717. The right of retainer of a trustee in such a case as *Cox* v. *Bennett* (*ubi sup.*) is of a different nature to that of a judgment creditor; for the principle of the restraint is directed against the latter and not against the former. (*e*) 56 & 57 Vict. c. 63, s. 2.

(*f*) This gives legislative sanction to the principle of the decision in *Re Andrews, Edwards* v. *Dewar*, 30 Ch. D. 159, in which Pearson, J., held that when a married woman, entitled to income which she was restrained from anticipating, instituted proceedings without a next friend against her trustees in which she took out a summons that was dismissed, her trustees were entitled to retain their costs out of her income.

(*g*) *Re Lumley, Ex parte Hood Barrs*, [1894] 3 Ch. D. 135; 63 L. J. Ch. 897.

(*h*) *Hollington* v. *Dear* (1896), W. N. 35.

(*i*) *Hood Barrs* v. *Cathcart*, [1894] 3 Ch. 376; 63 L. J. Ch. 793; *Hood Barrs* v. *Heriot*, [1897] A. C. 177; 66 L. J. Q. B. 356.

(*k*) *Moran* v. *Place*, [1896] P. 214; 65 L. J. P. 83.

(*l*) *Dresel* v. *Ellis*, [1905] 1 K. B. 574; 74 L. J. K. B. 401. In this case the Court of Appeal distinguished *Hood Barrs* v. *Cathcart* (*ubi sup.*) and *Hood Barrs* v. *Heriot* (*ubi sup.*).

(*m*) *Hood Barrs* v. *Cathcart*, [1895] 1 Q. B. 873; 64 L. J. Q. B. 520.

(*n*) *Crickitt* v. *Crickitt*, [1902] P. 177; 71 L. J. P. 65.

successful intervener in a divorce petition instituted by the wife (*o*); and to an unsuccessful joint action by her and her husband in which she was the real plaintiff (*p*); and to a claim to goods whereby interpleader proceedings are commenced (*q*). The Court can enforce payment of the costs of such proceedings unsuccessfully instituted by her by the appointment of a receiver (*r*). Whether this order against a married woman is one as of course or no seems to be doubtful; but if it is made, the onus is on her to show cause why it should not be enforced (*s*).

Effect of Restraint. The restraint upon anticipation is an effectual barrier against the married woman dealing with the property affected by it. She may neither sell it nor encumber it (*t*), nor exchange it for an estate of greater value in compliance with a condition in a will, except by order of the Court (*u*). A married woman who is restrained from alienating her property is not entitled to have such property paid out to her if a fund in Court (*x*), or to have a fund in the hands of those whose duty it is to pay it over to the trustees of her settlement paid over to her (*y*). Her separate estate is not bound, where she is restrained from anticipating, by her laches or acquiescence, or even for her breaches of trust (*z*), or for her torts, such as her own fraudulent acts (*a*), or for her contracts made during coverture (*b*). She cannot validly charge it (*c*), or get rid of its effect by assignment, release, or admission adverse to her own interest (*d*). So where the property is reversionary in its nature, and the restraint exists during the reversionary period, but ceases on its falling into possession, a charge upon it made before the latter event has happened is ineffectual (*e*). If she has no more than a life interest in the income of her separate

(*o*) *Studley* v. *Studley*, [1913] P. 119; 82 L. J. P. 65.
(*p*) *Marchioness of Huntly* v. *Gaskell*, [1905] 2 Ch. 656; 75 L. J. Ch. 66.
(*q*) *Nunn* v. *Tyson* (*Tyson claimant*), [1901] 2 K. B. 487; 70 L. J. K. B. 854.
(*r*) *Ibid.* and see *Pawley* v. *Pawley*, [1905] 1 Ch. 593; 74 L. J. Ch. 344.
(*s*) Per Buckley, J., in *Pawley* v. *Pawley* (*ubi sup.*).
(*t*) *Baggett* v. *Meux*, 1 Coll. 138; *Re Adamson, Public Trustee* v. *Billing* (1913), W. N. 188 (218).
(*u*) *Robinson* v. *Wheelwright*, 6 De G. M. & G. 535; 25 L. J. Ch. 385; *Haynes* v. *Foster*, [1901] 1 Ch. 361; 70 L. J. Ch. 302; *Re Grove, Public Trustee* v. *Dixon*, [1919] 1 Ch. 249; 88 L. J. Ch. 96.
(*x*) *Re Ellis' Trusts*, L. R. 17 Eq. 409; 43 L. J. Ch. 444.
(*y*) *Re Benton, Smith* v. *Smith*, 19 Ch. D. 227; 51 L. J. Ch. 185.
(*z*) *Clive* v. *Carew*, 28 L. J. Ch. 685.
(*a*) *Jackson* v. *Hobhouse*, 2 Mer. 483; *Stanley* v. *Stanley*, 7 Ch. D. 589; 47 L. J. Ch. 256; 45 & 46 Vict. c. 75, s. 19.
(*b*) *Roberts* v. *Watkins*, 46 L. J. Q. B. 552.
(*c*) *Stanley* v. *Stanley* (*ubi sup.*).
(*d*) *Bateman* v. *Faber*, [1898] 1 Ch. 144; 67 L. J. Ch. 130.
(*e*) Per Baggallay, L.J., in *Re Bown, O'Halloran* v. *King*, 27 Ch. D. 411; 53 L. J. Ch. 881

property, and she contracts debts, she will be liable for the same only to the amount of her separate interest, and her income might be capitalized and dealt with in satisfaction of her liabilities as if she were a single woman with a life interest in the property; but if she is restrained from anticipating her income, her creditors can only be satisfied by the income as it is paid into her hands, and she cannot, by suffering a judgment to go by default against her, enable them to attach the income before it is paid into her hands—otherwise the restraint would be rendered inoperative (*f*).

Arrears of Income.—After a considerable amount of litigation it has been clearly and finally settled by a decision of the House of Lords that a judgment recovered against a married woman whose property is subject to the restraint cannot be executed upon or enforced against arrears of income derived from the property so restrained which have accrued due after the date of the judgment (*g*). But the judgment may be enforced against income which has accrued due at or before its date, though the money has not reached her hands (*h*). A creditor who has obtained leave to sign final judgment cannot, by delay in signing, even with the leave of the Court, as by the appointment of a receiver, obtain equitable execution of her income which was not actually in arrear at the time of obtaining leave to enter judgment (*i*). The restraint imposed by a post-nuptial settlement made by her before the Married Women's Property Act, 1882, came into force, and not with a view to defraud creditors, was held as efficacious as a restraint imposed by a stranger (*k*).

Where, then, the property is restrained, no process can issue against it to enforce payment of any claims against a married woman out of arrears of income accruing due after the order of payment has been made, whether by judgment against her for default in paying (*l*), charging order (*m*), attachment (*n*),

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(*f*) *Chapman* v. *Biggs*, 11 Q. B. D. 27.

(*g*) *Hood Barrs* v. *Cathcart*, [1894] 2 Q. B. 559; *Whiteley* v. *Edwards*, [1896] 2 Q. B. 48; 65 L. J. Q. B. 457; *Bolitho* v. *Gidley and others*, [1905] A. C. 98; 74 L. J. K. B. 430; *Wood* v. *Lewis*, [1914] 3 K. B. 73; 83 L. J. K. B. 1046.

(*h*) *Hood Barrs* v. *Heriot*, [1896] A. C. 174; 65 L. J. Q. B. 352, overruling on this point *Hood Barrs* v. *Cathcart*, [1894] 2 Q. B. 559; and *Pillers* v. *Edwards*, 71 L. T. 788.

(*i*) *Collyer* v. *Isaacs*, 77 L. T. 198.

(*k*) *Beckett* v. *Tasker*, 19 Q. B. D. 7.

(*l*) *Draycott* v. *Harrison*, 17 Q. B. D. 147.

(*m*) *Stanley* v. *Stanley*, 7 Ch. D. 589; 47 L. J. Ch. 256.

(*n*) *Chapman* v. *Biggs*, 11 Q. B. D. 27.

sequestration (*o*), bankruptcy notice (*p*); or by the appointment of a receiver (*q*). In the case of *Hood Barrs* v. *Cathcart* (*r*) the Court of Appeal was of opinion that the Married Women's Property Act, 1882, was not intended to enable a judgment against a married woman to be enforced against arrears of her separate estate accruing due after the date of the judgment or order as to which she was restrained from anticipation either by means of a receiver, sequestration, charging order or any kind of process, for section 19 of the Act preserved the effect of the restraint, and before the Act after-acquired property could not have been reached by her creditors. Under the Married Women's Property Act, 1893 (*s*), the law remained the same.

Power of Bankruptcy Court.—In the case of married women traders, however, under section 52 of the Bankruptcy Act, 1914, where a married woman has been adjudged bankrupt, and has separate property, the income of which is subject to a restraint on anticipation, the Court has power on the application of the trustee to order that during such time as the Court may order the whole or some part of such income be paid to such trustee for distribution amongst the creditors, and in the exercise of such power the Court shall have regard to the means of subsistence available for the woman and her children.

Restrained Property Formerly Ineffectual for Contractual Purposes. For contractual purposes, then, both in equity (*t*) and under the Married Women's Property Act, 1882 (*u*), this restraint operates as a bar to a married woman making an effective contract, for the property over which it extends is deemed non-existent both for the purpose of entering into a binding contract or liability, and for satisfying any claim arising out of such contract or liability (*x*), and this privilege is extended to her when she is not sued on her post-nuptial contract until after the death of her husband (*y*). The stringent operation of

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(*o*) See *Re Lumley, Ex parte Hood Barrs*, [1894] 3 Ch. 135; 63 L. J. Ch. 897. The form of sequestration is general; but any property subject to the restraint cannot be taken: *Miller* v. *Miller*, L. R. 2 P. & M. 54; *Hyde* v. *Hyde*, 13 P. D. 166; 57 L. J. P. 89.

(*p*) *Re Lynes, Ex parte Lester*, [1893] 2 Q. B. 113; 62 L. J. Q. B. 372.

(*q*) *Pelton (Bros.)* v. *Harrison*, [1891] 2 Q. B. 422; 60 L. J. Q. B. 742; *Hood Barrs* v. *Cathcart*, [1894] 2 Q. B. 559; 63 L. J. Q. B. 602.

(*r*) [1894] 2 Q. B. 559.

(*s*) 56 & 57 Vict. c. 63.

(*t*) See *Pike* v. *Fitzgibbon*, 17 Ch. D. 454; 50 L. J. Ch. 394; *Stogdon* v. *Lee*, [1891] 1 Q. B. D. 661; 60 L. J. Q. B. 669.

(*u*) Sect. 1, sub-s. 2, 3, and 19.

(*x*) *Beckett* v. *Tasker*, 19 Q. B. D. 7; *Palliser* v. *Gurney*, 19 Q. B. D. 519; 56 L. J. Q. B. 546; approved by Court of Appeal in *Stogdon* v. *Lee* (*ubi sup.*).

(*y*) *Pelton (Bros.)* v. *Harrison* (*ubi sup.*).

the restraint is illustrated by those cases in which a married woman having only separate property, which she is restrained from anticipating, or a small amount of free separate property at the time of contracting a debt or making a contract will not reasonably be deemed to have made herself liable in respect of her restrained or free property (*z*). This construction is applicable only to contracts affected by the old law or under the Married Women's Property Act, 1882, for under the Married Women's Property Act, 1893 (*a*), the existence of free separate estate is not necessary to the validity of her contract. Where she has separate property part of which is free and part is subject to the fetter, and enters into a contract on which she is sued, but before judgment disposes of free separate property, execution on the judgment will not be granted against the property which she is restrained from anticipating (*b*).

Where a married woman had only separate property which she was restrained from anticipating, she could not have made a valid contract, yet where she was sued otherwise than in contract, as, for instance, when sued by executors to refund calls made on shares assigned to her by the legatee and left standing in the executors' names, her liability to make good the claim against her was not affected by such fact, though possibly the relief obtained against her might be very slight because of the restraint (*c*).

Modification by Married Women's Property Act, 1893.—In one important particular the Married Women's Property Act, 1893, has modified the effect of the restraint in making the property affected by it practically non-existent for contractual purposes, for if a married woman enters into an engagement at a time when she is restrained from dealing with her property, and subsequently acquires property which has no such fetter upon it, her creditor will now be able to enforce his claim against the latter class of property, which formerly he was unable to do.

As "restraint upon anticipation" is the same as "restraint upon alienation," it has been held that a married woman is not bound by her covenant to settle after-acquired property where she is left property by will for her separate use without power

(*z*) *Harrison* v. *Harrison*, 13 P. D. 180; *Leake* v. *Driffield*, 24 Q. B. D. 98; 59 L. J. Q. B. 89; *Braunstein* v. *Lewis*, 65 L. T. 449.

(*a*) 56 & 57 Vict. c. 63.

(*b*) *Pelton (Bros.)* v. *Harrison (ubi sup.)*.

(*c*) *Whittaker* v. *Kershaw*, 45 Ch. D. 320; 60 L. J. Ch. 9. But the decision in this case does not seem to have altogether commended itself to the Court of Appeal in *Hood Barrs* v. *Cathcart*, [1894] 2 Q. B., at p. 574.

of anticipation; the capital of personal estate so left is not payable to her on her separate receipt (*d*). But on the other hand it has been held that unless there is some provision in the document of title under which the married woman takes that she shall not in any event deal with the property as long as she is under coverture, the restraint lasts only while the property is in a reversionary state, and when it comes into her hands the fetter ceases to bind; and so a covenant by her to settle after-acquired property contained in an ante-nuptial settlement executed by her before the date of her title to such property is effectual to bind the property when transferred to her (*e*). Anticipating is not the same as attempting to anticipate; consequently if there is a gift over, if the married woman anticipate, such gift over will not take effect if she merely attempts to anticipate her interest (*f*).

The restraint does not prevent a married woman from being held liable to refund out of her income money which she was permitted by an erroneous order of the Court to receive which is reversed on appeal, for such liability does not arise out of contract. Her liability to refund extends up to the date of the order reversing the erroneous decision; but after such date the restraint protects her from any further liability (*g*).

Restraint cannot be Dispensed With.—This restraint on anticipation is a modification of the right of a married woman over her property which the Court itself cannot dispense with (*h*), except her estate be subject to paramount equities, such as for raising costs of suit (*i*); and where she is a respondent in a suit for dissolution of marriage on the ground of her adultery, the Divorce Court may deal with it (*k*). It has, however, been held that the enlargement of an estate in tail to one in fee is no violation of the restraint (*l*). The restraint prevents her from dealing with any settled property subject to it, and she cannot

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(*d*) *Re Currey, Gibson* v. *Way*, 32 Ch. D. 361; 55 L. J. Ch. 906 & 56 L. J. Ch. 389.

(*e*) *Re Bankes, Reynolds* v. *Ellis*, [1902] 2 Ch. 333; 71 L. J. Ch. 708. This decision was based on those in the cases of *Re Bown, O'Halloran* v. *King*, 27 Ch. D. 411: 53 L. J. Ch. 881, and *Re Holmes, Hallows* v. *Holmes*, 67 L. T. 335; but it is difficult to reconcile it with *Re Currey, Gibson* v. *Way* (*ubi sup.*). The later decision would seem to be the more correct.

(*f*) *Re Wormald, Frank* v. *Muzeen*, 43 Ch. D. 630; 59 L. J. Ch. 404.

(*g*) *Re Dixon, Dixon* v. *Smith*, 35 Ch. D. 4; 56 L. J. Ch. 773.

(*h*) *Robinson* v. *Wheelwright*, 21 Beav. 214; affirmed 6 De G. M. & G. 535; *Kenrick* v. *Wood*, L. R. 9 Eq. 333.

(*i*) *Fleming* v. *Armstrong*, 11 L. T. 470.

(*k*) *Pratt* v. *Jenner*, L. R. 1 Ch. App. 493.

(*l*) *Cooper* v. *Macdonald*, 7 Ch. D. 288; 47 L. J. Ch. 373.

be put to her election in respect of such property, which would result in her alienating the settled property by way of compensation for having exercised her capacity to elect (*m*). "A married woman cannot by hook or by crook—by any device, even by her own fraud (the cases go to that length)—deprive herself of the protection which the restraint on anticipation throws around her. . . . The result is that a married woman, having an estate for her separate use without power of anticipation, can play fast and loose to a greater extent than if she were a *feme sole*" (*n*).

Even in Cases of Fraud.—Though the Court is loth to enable any person to commit a fraud, yet in the case of a restraint upon anticipation it will not allow the fetter to be removed where it would be equitable for the woman to pay her just debts (*o*); and even though the woman has been guilty of gross fraud in respect of the property over which it extends; and where, in one case, she had property settled to her separate use, with restraint upon anticipation, and concurred in a fraudulent mortgage of such property, concealing the fact of the restraint, a charging order obtained by the mortgagee to charge her next accruing dividend was discharged, for in no case, and by no device, could the restraint be evaded (*p*); and *a fortiori* there is no equity to apply income which a married woman is restrained from anticipating, to make good the consequences of her fraud, where the restraint upon anticipation appears from the instrument in respect of which relief is sought (*q*).

Widowhood does not Act Retrospectively.—The mere fact of a married woman becoming a widow does not work retrospectively to remove the fetter of the restraint from her property affected by it, so as to render it liable for her contracts made during coverture (*s*); and where a married woman signed promissory notes, upon which judgment was recovered against her after her husband's death, the Court refused to appoint a receiver, by way of equitable execution of the judgment, of the income of

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(*m*) *Re Vardon's Trusts*, 31 Ch. D. 275; 55 L. J. Ch. 259. See *Smith* v. *Lucas*, 18 Ch. D. 531; *Re Wheatley*, *Smith* v. *Spence*, 27 Ch. D. 606; 54 L. J. Ch. 201; *Cahill* v. *Cahill*, 8 App. Cas. 420.

(*n*) Per Lindley, M.R., in *Bateman* v. *Faber*, [1898] 1 Ch. at p. 149; 67 L. J. Ch. 130.

(*o*) See *Hood Barrs* v. *Cathcart*, [1894] 2 Q. B. 559; 63 L. J. Q. B. 602.

(*p*) *Stanley* v. *Stanley*, 7 Ch. D. 589; 47 L. J. Ch. 256. See Lindley, M.R., in *Bateman* v. *Faber* (*ubi sup.*).

(*q*) *Arnold* v. *Woodhams*, L. R. 16 Eq. 30; 42 L. J. Ch. 578.

(*s*) See *Softlaw* v. *Welch*, [1899] 2 Q. B. 419; 68 L. J. Q. B. 940.

trust funds to which she was entitled for life for her separate use, without power of anticipation (*t*).

Removal under Law of Property Act, 1925.—The Law of Property Act, 1925, repeals section 39 of the Conveyancing Act, 1881, which was reproduced in section 7 of the Conveyancing Act of 1911, and provides that "where a married woman is restrained from anticipation or from alienation in respect of any property or any interest in property belonging to her, or is by law unable to dispose of or bind such property or her interest therein, including a reversionary interest arising under her marriage settlement, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in such property" (*u*). It will be seen that before this section can be put in force, there are two conditions precedent: first, the Court must be of opinion that to remove the restraint will be for the woman's benefit (*x*); secondly, she herself must consent to have the restraint removed.

The power given to the Court of dispensing with the restraint is a discretionary one, and to be exercised with great caution, and only where a strong case is made for it, and is not necessarily to be exercised merely for the benefit of the married woman (*y*). No general power of removing the restraint is conferred on the Court (*z*). The following are some cases in which relief was granted, and in others refused, by the Court. In one case, where a married woman was entitled to the income of a fund for her separate use without power of anticipation, with remainder in trust for her children, and in default of issue for her appointees by will, and in default of appointment for herself absolutely, and she was childless and past the age of child-bearing, and had contracted a considerable amount of debt which she was desirous of paying off, the Court made an order removing the restraint (*a*); and in another case the Court removed the restraint where it approved of the terms of a compromise, and the married woman consented to it (*b*); where

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(*t*) *Brown* v. *Dimbleby*, [1904] 1 K. B. 28; 73 L. J. K. B. 35, following *Barnett* v. *Howard*, [1900] 2 Q. B. 784; 69 L. J. Q. B. 955.
(*u*) 15 Geo. V. c. 20, s. 169.
(*x*) *Re Flood's Trusts*, 11 L. R. Ir. 355.
(*y*) *Re Little's Will*, *Re Harrison*, 36 Ch. D. 701; 56 L. J. Ch. 872; *Re Grove*, *Public Trustee* v. *Dixon*, [1919] 1 Ch. 249; 88 L. J. Ch. 96.
(*z*) *Re Warren's Settlement*, 52 L. J. Ch. 928.
(*a*) *Hodges* v. *Hodges*, 20 Ch. D. 749; 51 L. J. Ch. 549.
(*b*) *Musgrave* v. *Sandeman*, 48 L. J. 215.

she had entangled herself in her husband's affairs, and was suffering in health through pecuniary embarrassments, even though she had only a life interest in the fund subject to the restraint (*c*), where two married women were tenants in common of certain house property of which desirable leases could not be obtained because they were restrained from anticipating, and it was also for their benefit that a partition of the settled property should be made, and a settlement made in moieties (*d*); to enable a jointress to consent to the payment out of the purchase-money of a settled estate sold under the Settled Land Act, 1882, of mortgages upon the estate over which her jointure had priority (*e*). The relief will sometimes take the form of allowing the separate income of the married woman to be applied in paying debts or keeping down the interest on incumbrances (*f*). The Court has a discretion under the Act to let into possession of the settled land a married woman who is a tenant for life of it, and though restrained from anticipation to exercise the wide powers of a tenant for life, except the power of sale and exchange (*g*). When an order of the Court is made under the Act, it is the order which binds the estate, and not what the married woman does after the restraint is removed. But though the order is silent as to the wife's equity of exoneration, if the removal is to enable her to pay her husband's debts, yet if the circumstances point to the existence of such equity she will be entitled to enforce it afterwards (*h*).

The Court has refused to grant the relief where it would work a forfeiture of the married woman's interest in the settled fund (*i*); or where to grant the dispensation would be to give effect to a release executed by the married woman donee of a power of appointment for her own benefit (*k*). The benefit is a pecuniary benefit; and where to remove the restraint would be to diminish her income, the Court will not order its removal (*l*). The Court has no power to order the removal where the married

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(*c*) *Re C.'s Settlements*, 56 L. J. Ch. 556.

(*d*) *Re Currey, Gibson* v. *Way*, 32 Ch. D. 361; 56 L. J. Ch. 389.

(*e*) *Re Marquis of Ailesbury and Lord Iveagh*, [1893] 2 Ch. 345; 62 L. J. Ch. 713. In such a case the Court must be satisfied that the amount of the jointure can be raised out of the income of the purchase-money.

(*f*) *Re Milner's Settlement*, [1891] 3 Ch. 547.

(*g*) *Re Bagot's Settlement, Bagot* v. *Kittoe*, [1894] 1 Ch. 177; 63 L. J. Ch. 515.

(*h*) See *Paget* v. *Paget*, [1898] 1 Ch. 470; 69 L. J. Ch. 266.

(*i*) *Re Jordan, Kino* v. *Picard*, 55 L. J. Ch. 330.

(*k*) *Re Warren's Settlement*, 52 L. J. Ch. 928.

(*l*) *Thomson* v. *Thomson and Rodschinka*, [1896] P. 263; 65 L. J. P. 65.

woman has ceased to be such by a decree of dissolution of marriage (*m*); nor will it grant the relief where the removal is sought merely for the purpose of raising money for the payment of debts incurred through her own or her husband's extravagances (*n*). A mere increase of income is not such a sufficient benefit as to justify the Court in removing the restraint from trustee securities to others of a speculative nature; though the latter would have been allowed by the settlement (*o*).

Acquiescence in Breach of Trust.—In equity a married woman (whose property was subject to the restraint) who acquiesced in a breach of trust by her trustees was debarred from obtaining relief against them and making them account for the loss sustained through their misfeasance (*p*); unless her acquiescence had been obtained by undue influence (*q*). Where she was herself a party to the breach of trust her trustees were to some extent protected; and where they claimed a right of retainer against her life interest to indemnify themselves against their breach of trust to which she had been a party, they must show that she both acted for herself in the breach of trust, and was fully informed of the state of the case (*r*). Merely allowing the husband to receive the trust funds in breach of the trust would not bar her remedy against him (*s*); but where her full consent and acquiescence in the course of conduct of her husband or her trustees could be shown, her claim would be barred (*t*). Her passive concurrence or acquiescence in a breach of trust does not bar her claim to have it remedied (*u*). The Trustee Act, 1893 (*x*), now repealed as from January 1, 1926, by the Trustee Act, 1925, provided that where a married woman instigated, requested, or consented in writing to a breach of trust, all or any part of her property might be impounded by way of indemnity, though subject to restraint (*y*). In such a case, however, it is submitted, the trustees would have to prove

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(*m*) *Thomson* v. *Thomson*, [1896] P. 263; 65 L. J. P. 65.
(*n*) *Re Pollard's Settlement*, [1896] 2 Ch. 552; 65 L. J. Ch. 796.
(*o*) *Re Blundell*, [1901] 2 Ch. 221; 70 L. J. Ch. 522.
(*p*) *Hanchett* v. *Briscoe*, 22 Beav. 496; *Jones* v. *Higgins*, L. R. 2 Eq. 538; 35 L. J. Ch. 403.
(*q*) See *Hughes* v. *Wells*, 9 Ha. 749.
(*r*) *Ryder* v. *Bickerton*, cited 3 Swanst. 80; *Sawyer*-v. *Sawyer*, 28 Ch. D. 595; 54 L. J. Ch. 444.
(*s*) *Hughes* v. *Wells* (*ubi sup.*).
(*t*) See *Edward* v. *Cheyne*, 13 App. Cas. 385; *Hale* v. *Sheldrake*, 60 L. T. 292.
(*u*) *Cocker* v. *Quayle*, R. & M. 535; *Pemberton* v. *McGill*, 8 W. R. 290; *Arnold* v. *Woodhams*, L. R. 16 Eq. 29; 42 L. J. Ch. 578.
(*x*) 56 & 57 Vict. c. 53, s. 45.
(*y*) See *Re Holt*, *Holt* v. *Holt*, [1897] 2 Ch. 525; 66 L. J. Ch. 734.

that she acted for herself and was fully informed of her position and liability (*z*). It is the duty of the trustee to protect his *cestui que trust*, who is restrained from anticipating, against herself when asking him to commit a breach of trust; and if he commit a breach of trust, the Court will be slow to assist him by removing the restraint on anticipation to indemnify him for the breach of trust (*a*).

Procedure.—Where the settled fund is not itself dealt with, the Court will make an order binding the married woman's interest without the trustees being served with the notice (*d*).

The Act does not seem to enable the Court to deal with the property of a married woman who has been guilty of a deliberate fraud in respect of her separate estate, for her consent is necessary, and if she withhold it the Court is powerless (*e*).

Application should be by summons (*f*); but it has been held that the jurisdiction of the Court to hear such matters by petition has not been impaired (*g*).

Divorce Court.—The Divorce Court has no jurisdiction except after a final decree of nullity of marriage under the Matrimonial Causes Act, 1859 (*h*), to make a settlement of a married woman's property which is subject to this restraint; consequently it has no power to order a settlement of a wife's property subject to this restraint under section 3 of the Matrimonial Causes Act, 1884 (*i*), where she has refused to comply with a decree obtained by her husband for restitution of conjugal rights (*k*). The Supreme Court of Judicature Consolidation Act, 1925, gives the Court power to order payments only when the wife applies for restitution (*kk*).

Alimony which has been decreed to a married woman is in

(*z*) See *Sawyer* v. *Sawyer* (*ubi sup.*).

(*a*) *Ricketts* v. *Ricketts*, 64 L. T. 263; *Bolton* v. *Curre*, [1895] 1 Ch. 544; 64 L. J. Ch. 164.

(*d*) *Re Little's Will*, *Re Harrison*, 36 Ch. D. 701; 56 L. J. Ch. 872.

(*e*) *Thomas* v. *Price*, 16 L. J. Ch. 76; *Stanley* v. *Stanley*, 7 Ch. D. 589; 47 L. J. Ch. 256.

(*f*) 44 & 45 Vict. c. 41, s. 69, sub-s. 3. *Re Lillwall's Settlement*, 30 W. R. 243; *Latham* v. *Latham* (1889), W. N. 171.

(*g*) See *Re Blundell*, [1901] 2 Ch., at p. 233; 70 L. J. Ch. 522, per Farwell, J.

(*h*) 22 & 23 Vict. c. 61, s. 5.

(*i*) 47 & 48 Vict. c. 68.

(*k*) *Michell* v. *Michell*, [1891] P. 208; and see *Swift* v. *Swift*, [1891] P. 129; 60 L. J. P. 14.

(*kk*) 15 & 16 Geo. V. c. 49, s. 187.

the nature of separate property, subject to restraint against anticipation, and cannot be assigned by her (*l*).

Powers Notwithstanding Restraint.—Restraint upon anticipation does not prevent a married woman from exercising her powers under the Settled Land Act, 1925, and she may exercise such powers without her husband (*m*). Though a married woman may, under section 40 of the Conveyancing Act, 1881 (now replaced by section 129 of the Law of Property Act, 1925), appoint an attorney to receive dividends and income which she is restrained from anticipating, yet such power will not be allowed to operate to get rid of the restraint (*o*). The order of Court enabling her so to receive her income should set out on its face the restraint upon anticipation (*o*).

Rule against Perpetuities.—The restraint must not offend against the rule against perpetuities, otherwise it will be ineffectual and void (*p*). It is true that in *Herbert* v. *Webster* (*q*), and *Cooper* v. *Laroche* (*r*), effect was given to the clause imposing the restraint, though it offended against the above rule, but the latter case was not followed by Chitty, J., in *Re Dawson*, *Johnston* v. *Hill* (*s*); and in *Re Ridley*, *Buckton* v. *Hay* (*t*), Jessel, M.R., came, no doubt, with reluctance to his decision, but the current of authority is in favour of the proposition that the restraint is void; thus it has been decided that the restraint imposed by a general clause in a will upon all the shares of daughters of the testator's children was good as to the shares of those members of the class who were born in the testator's lifetime, but void as to the shares of those born afterwards (*u*). The fact that the persons on whom the restraint would operate are *in esse* at the time of making the limitation is immaterial if the restraint offends against the rule (*x*). Where the limita-

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(*l*) *Re Robinson*, 27 Ch. D. 160; 53 L. J. Ch. 986; *Linton* v. *Linton*, 15 Q. B. D. 239; 54 L. J. Q. B. 529.

(*m*) 15 Geo. V. c. 18, s. 25.

(*o*) *Stewart* v. *Fletcher*, 38 Ch. D. 627; 57 L. J. Ch. 765, where the proper order to be drawn up in such a case is set out.

(*p*) *Re Teague's Settlement*, L. R. 10 Eq. 564; *Re Cunynghame's Settlement*, 11 Eq. 324; 40 L. J. Ch. 247; *Re Michael's Trusts*, 46 L. J. Ch. 651; *Re Ridley*, *Buckton* v. *Hay*, 11 Ch. D. 645; 48 L. J. Ch. 527.

(*q*) 15 Ch. D. 10.

(*r*) 17 Ch. D. 168.

(*s*) 39 Ch. D. 155.

(*t*) *Ubi sup.*

(*u*) *Re Ferneley's Trusts*, [1902] 1 Ch. 543; 71 L. J. Ch. 422. In this case *Herbert* v. *Webster*, 15 Ch. D. 610; 49 L. J. Ch. 620, was followed; but *Re Michael's Trusts* (*ubi sup.*), and *Re Ridley*, *Buckton* v. *Hay* (*ubi sup.*), were not followed.

(*x*) *Re Ridley*, *Buckton* v. *Hay* (*ubi sup.*).

tion on which the restraint is to take effect does not offend against the rule but the restraint does, the former will have effect given to it though the latter will be rejected (*y*).

Election by Married Women.—As an incident of her undoubted right to dispose of her separate property, a married woman was liable to be put to her election whether she would take under or against a deed by which she became entitled to property (*z*); but she cannot be put to her election so as to affect her non-separate property; nor can she be bound (if affected by the former rules of equity or the Married Women's Property Act, 1882) in respect of property which is not in existence at the date of the election (*a*); but it would seem that under the Married Women's Property Act, 1893, if not otherwise disabled from electing, she might by her election affect future property. Where it becomes a question whether a married woman should take under or reject the provisions of the same instrument, the equity doctrine of election applies to her, and she must exercise her election in the matter. The doctrine of election is based on compensation—that is, making up an equivalent to those who are disappointed by the act of election; and where a deed or will purports to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions, and renouncing every right inconsistent with them (*b*). It is also founded on the presumption of a general intention that every part of an instrument shall take effect; but the presumption of such general intention may be rebutted by an inconsistent particular intention apparent in the instrument (*c*). The addition of the restraint on anticipation evinces an intention inconsistent with the application of the doctrine of election (*d*); and this intention is not affected by the fact that the married woman has subsequently become discovert (*e*). This question of election in the case of a married woman usually arises where she (as an infant) has by her settle-

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(*y*) *Fry* v. *Capper*, Kay, 163; and see *Armitage* v. *Coates*, 35 Beav. 1.

(*z*) *Barrow* v. *Barrow*, 4 K. & J. 409; followed in *Smith* v. *Lucas*, 18 Ch. D. 531, and *Wilder* v. *Pigott*, 22 Ch. D. 264; 52 L. J. Ch. 263. In the latter case it was held that if the wife had not elected the Court would have elected on her behalf, she having become of unsound mind.

(*a*) See *Smith* v. *Lucas* (*ubi sup.*).

(*b*) Per Lord Cairns, C., in *Codrington* v. *Codrington*, L. R. 7 H. L., at p. 861; 45 L. J. Ch. 660.

(*c*) 1 Swanst. 404 (*n*); *Re Vardon's Trusts*, 31 Ch. D. 275; 55 L. J. Ch. 259.

(*d*) *Haynes* v. *Foster*, [1901] 1 Ch. 361; 70 L. J. Ch. 302.

(*e*) *Ibid.*

ment had property settled on her, and in the same instrument she covenants to settle after-acquired property, which covenant she repudiates or disaffirms on reaching majority, or when the time comes for enforcing the covenant. But if she never was in a position to elect, she cannot be compelled to do so (*f*). This question will be discussed more fully in Part IV. chap iv., which deals with the marriage settlements of infants.

A married woman who is restrained from anticipating a fund by the instrument of settlement cannot be put to her election in respect of other property acquired by her under the same instrument, for the rule of not claiming by one part of an instrument in contradiction to another part has exceptions, and the ground of exception seems to be a particular intention denoted by the instrument different from that general intention, the presumption of which is the foundation of the doctrine of election (*g*); and the restraint against anticipation over the settled fund is, as above shown, a declaration of a particular intention inconsistent with the doctrine, and therefore excludes it (*h*) Where a married woman is tenant for life with power to appoint at her decease, the mere fact that she is restained from anticipating does not prevent her from exercising the power by deed, and does not limit her to a testamentary exercise only (*i*).

Section 5.

Separate Property in Respect of which Liability Exists.

This section deals with the property of a married woman which can be taken in execution to satisfy her liabilities.

Former Rule.—The general engagements of a married woman could formerly only be enforced against so much of her separate estate, to which she was entitled free from restraint upon anticipation at the time when the engagements were entered into, as remained at the time when the judgment was given, and not against the separate property to which she became entitled after the time of making the engagements, nor against separate property to which she was entitled at the time of making the engagements subject to a restraint on anticipation (*k*). It was

(*f*) See *Harle* v. *Jarman*, [1895] 2 Ch. 419; 64 L. J. Ch. 779.
(*g*) 1 Swanst. 404 (*n*).
(*h*) *Re Vardon's Trusts* (*ubi sup.*).
(*i*) *Re Waddington*, *Bacon* v. *Bacon* (1897), W. N. 6.
(*k*) *Pike* v. *Fitzgibbon*, 17 Ch. D. 454; 50 L. J. Ch. 394.

laid down in *King* v. *Lucas* (*l*) that, under the former state of the law, to enable her to enter into a contract which could be enforced against her, a married woman must have had some free property existing at the date of the contract.

Separate Property Bound.—The Married Women's Property Act, 1882 (*m*), provides that "every contract entered into by a married woman with respect to, and to bind her separate property, shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." Section 19 of the same Act, as has been seen in the previous section, preserves the effect of the restraint upon anticipation, unless its operation is to withdraw property that ought to be taken to satisfy the claims of her creditors. The effect of these sections renders future-acquired property of a married woman without a restraint against anticipation upon it, or with a restraint that is improperly imposed on it, liable for her debts which have been contracted since the Act came into force. But section 1, sub-section 4, is not retrospective in its operation (*n*).

Under this Act the married woman must have *some free* separate property at the date of the contract, to render it enforceable against her (*o*); if she has no free separate property at the time of entering into a contract, the future-acquired property will not be bound by her previous engagement. It is not necessary that such free separate property should be of a large amount, or of any particular description, but she must reasonably be deemed to have contracted in respect of it (*p*).

But in respect of contracts made by a married woman after December 5, 1893 (*q*), the existence of separate property at the time of making a contract is not necessary to its validity (*r*); and her after-acquired property is liable to be taken in execution in respect of such contract. The later Act repeals section 1, sub-section 4, of the Married Women's Property Act, 1882, and the cases decided under that sub-section are no longer authorities

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(*l*) 23 Ch D. 712; 53 L. J. Ch. 64.

(*m*) Sect. 1, sub-s. 4.

(*n*) *Conolan* v. *Leyland*, 27 Ch. D. 632; 54 L. J. Ch. 123; *Turnbull* v. *Forman*, 15 Q. B. D. 234; 54 L. J. Q. B. 489.

(*o*) *Palliser* v. *Gurney*, 19 Q. B. D. 519; 56 L. J. Q. B. 546; *Stogdon* v. *Lee*, [1891] 1 Q. B. 661; 60 L. J. Q. B. 669; *Re Shakspear, Deakin* v. *Lakin*, 30 Ch. D. 169; 55 L. J. Ch. 44.

(*p*) *Harrison* v. *Harrison*, 13 P. D. 180; *Leake* v. *Driffield*, 24 Q. B. D. 98; 59 L. J. Q. B. 89; *Braunstein* v. *Lewis*, 65 L. T. 449; *Everett* v. *Paxton*, 65 L. T. 383.

(*q*) Date of the passing of 56 & 57 Vict. c. 63.

(*r*) Sect. 1 (a).

as to contracts affected since the date of the coming into force of the later Act; but the new provision is not retrospective, that is to say, the contract to bind a married woman must be one made after the Act; and an acknowledgment after the Act of a contract made before the Act (though good enough for the Statute of Limitations) does not constitute a binding obligation upon her (*s*).

Unless Restraint upon Anticipation.—Separate property, however, subject to a restraint against anticipation, was not liable for debts contracted by a married woman, and it was only as to property unaffected by this fetter that she was considered to be in all respects as a *feme sole*, so that all her property could be made liable to satisfy the claims of her creditors.

The Married Women's Property Act, 1882, does not interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman, than a settlement or agreement for a settlement made or entered into by a man would have against his creditors (*t*).

The Married Women's Property Act, 1893 (*u*), also provides that "nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract, any separate property which at that time or thereafter she is restrained from anticipating." This proviso affects the whole of the preceding part of the section; and the words "at that time or thereafter" refer to the time of entering into the contract or to the period subsequent to the contract; therefore, any property acquired by a married woman subsequent to the making of the contract which she is restrained from anticipating is not available to satisfy any liability or obligation arising out of the contract; and this is so whether she be covert or discovert when her liability is sought to be enforced (*x*).

(*s*) *Re Wheeler, Hankinson* v. *Hayter*, [1904] 2 Ch. 66; 73 L. J. Ch. 576.
(*t*) Sect. 19.
(*u*) Sect. 1, proviso.
(*x*) *Barnett* v. *Howard*, [1900] 2 Q. B. 784; 69 L. J. Q. B. 955; *Brown* v.

Removal of Restraint.—There is, then, no difference in the principle of the law before and after the late Acts with regard to separate property which a married woman is restrained from anticipating being rendered not liable for her engagements entered into during coverture, unless the restraint has been imposed by herself under such circumstances that the Court would not give effect to it; though there is an exception to this proposition of law under the Act of 1893, in the case of an action or proceeding instituted by a married woman or a next friend on her behalf, in which the Court may order the costs of the opposite party to be paid out of her property subject to such restraint (*y*). This provision is not retrospective (*z*), and does not apply to an appeal by her in an action in which she is a defendant (*a*). But the Court has allowed the restraint to be removed to enable a married woman to pay the costs of an unsuccessful action instituted by her before the Act came into force (*b*). For what is and what is not an "institution" of an action or proceeding by a married woman rendering her restrained separate property liable or not liable, see *ante*, p. 366.

What Property may be Taken.—The *corpus* of property settled to the separate use of a married woman subject to no restraint against anticipation is available to satisfy her liabilities, and may be taken in execution (*c*), and the settled separate property, equally with unsettled property, of a married woman, whether *corpus* or income, may be so taken (*d*). Income or arrears arising from property subject to the restraint that have accrued due after the act that results in the liability of a married woman is free separate property, which can be attached when found in the hands of the married woman or of those holding it on her behalf (*e*). As to the power of the Court of Bankruptcy, see p. 369, *ante*.

Income or arrears of income arising from separate estate so fettered accruing due previous to the act that constitutes her liability cannot be attached to make good that liability (*f*). As

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Dimbleby, [1904] 1 K. B. 28; 73 L. J. K. B. 35; *Wood* v. *Lewis*, [1914] 3 K. B. 73; 83 L. J. K. B. 1046.

(*y*) Sect. 2.

(*z*) *Re Lumley, Ex parte Hood Barrs*, [1894] 3 Ch. D. 135; 63 L. J. Ch. 897.

(*a*) *Hood Barrs* v. *Cathcart*, [1894] 3 Ch. 376; 63 L. J. Ch. 793.

(*b*) *Re Godfrey, Thorne* v. *Godfrey*, 63 L. J. Ch. 854.

(*c*) See *Norton* v. *Turvill*, 2 P. Wms. 144; *Picard* v. *Hine*, L. R. 5 Ch. App. 274.

(*d*) *Re Armstrong, Ex parte Boyd*, 21 Q. B. D. 264; 57 L. J. Q. B. 553.

(*e*) Per Cotton, L.J., in *Re Glanvill, Ellis* v. *Johnson*, 31 Ch. D. 532; 55 L. J. Ch. 325; *Hyde* v. *Hyde*, 13 P. D. 166; 57 L. J. P. 89.

(*f*) *Re Glanvill, Ellis* v. *Johnson* (*ubi sup.*).

long as the fetter of the restraint exists her future separate income cannot be attached by the appointment of a receiver, for the appointment of such receiver is inconsistent with her disability to anticipate, or by sequestration, charging order, or any kind of process (*g*); also arrears of income that have accrued due after the date of the judgment against the married woman cannot be attached (*h*). But arrears of income which have accrued due at or before the date of the judgment (the material time), though they have not reached her hands, may be taken (*i*).

Property Coming to a Married Woman when Discovert.—Section 1, sub-section (c), of the Married Women's Property Act, 1893 (*k*), enacts: "Every contract hereafter entered into by a married woman . . . shall also be enforceable by process of law against all property which she may thereafter, while discovert, be possessed of or entitled to." The effect of this sub-section is to render property coming to a woman when discovert, which is neither strictly nor technically "separate property," liable under process of law for debts and contracts entered into by her during coverture. In equity and under the Married Women's Property Act, 1882, non-separate property was not liable to make good her post-nuptial liabilities, and property accruing to her when discovert was not of the nature of separate estate (for the separate use implied a proprietary interest in the wife apart from that of the husband), unless she married again, and in consequence it became her separate estate. Where judgment was recovered against a married woman, who subsequently obtained a dissolution of her marriage and married again, and by settlement on her second marriage settled property to her separate use without power of anticipation, it was held that the debt was contracted before marriage, and that she continued to be liable for it after her second marriage, and the restriction had no validity (*l*). In *Pelton (Bros.)* v. *Harrison* (*m*), Kay, L.J., held that section 1, sub-section 4, of the Married Women's Property Act, 1882, was not intended to make any property acquired by a woman when discovert or any property, though separate property, as to which during coverture she was restrained from anticipation, liable to execution. A distinction

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(*g*) *Hood Barrs* v. *Cathcart*, [1894] 2 Q. B. 559; 63 L. J. Q. B. 602.
(*h*) *Ibid.*
(*i*) *Hood Barrs* v. *Heriot*, [1896] A. C. 174; 65 L. J. Q. B. 352. See p. 368.
(*k*) 56 & 57 Vict. c. 63.
(*l*) *Jay* v. *Robinson*, 25 Q. B. D. 467; 59 L. J. Q. B. 367.
(*m*) [1891] 2 Q. B. 427; 60 L. J. Q. B. 742.

is to be drawn between separate property and non-separate property, and the proviso in section 1 of the later Act preserves the effect of a valid restraint upon anticipation (*n*); therefore, while all the separate property which under sub-section (c) of the same section is bound by her contracts must be free in its nature, the property acquired by her when discovert cannot have this fetter laid upon it, but is free for all purposes, including the satisfaction of post-nuptial claims against her (*o*). Thus, the general decision in the two cases of *Beckett* v. *Tasker* (*p*), and *Pelton* (*Bros.*) v. *Harrison* (*q*), to the effect that separate estate with a restraint against anticipation, belonging to the married woman when entering into a contract, whether imposed by a stranger or herself, is not property liable to satisfy a judgment in respect of such contract obtained when she is discovert, remains the law (*r*); while the holding of Kay, L.J., in the latter case, that property acquired by a woman when discovert is not liable to execution to satisfy contracts made by her during coverture, is no longer law as regards contracts made after December 5, 1893.

Property Subject to General Power of Appointment.—There is another class of separate property which is, under certain circumstances, liable to satisfy the claims of a married woman's creditors, that is, property over which she has a general power of appointment by will or deed, or by will only. A general power of appointment by deed or will, unaccompanied by any restraint on anticipation, renders a married woman mistress of the fund over which she can exercise it, on the ground that in common sense and to common apprehension it is an absolute gift to her sole and separate use (*s*). So, too, where there is such general power of appointment with remainder on certain contingencies which are fulfilled (*t*). "The true view seems to be this, that for the purpose of giving effect to the general engagements of a married woman, if property is settled upon her for life with power to dispose of it by deed or will so as to be subject to her general engagements" (*u*); and "if property is

(*n*) See *Barnett* v. *Howard*, [1900] 2 Q. B. 784; 69 L. J. Q. B. 955; *Brown* v. *Dimbleby*, [1904] 1 K. B. 28; 73 L. J. K. B. 35; *Wood* v. *Lewis*, [1914] 3 K. B. 73; 83 L. J. K. B. 1046.

(*o*) Sub-sect. (c).

(*p*) 19 Q. B. D. 10.

(*q*) [1891] 2 Q. B. 427; 60 L. J. Q. B. 742.

(*r*) See *Softlaw* v. *Welch*, [1899] 2 Q. B. 419; 68 L. J. Q. B. 940.

(*s*) *London Chartered Bank of Australia* v. *Lemprière*, L. R. 4 P. C. 572; 42 L. J. P. C. 49; *Jenney* v. *Andrews*, 6 Madd. 264.

(*t*) *Mayd* v. *Field*, 3 Ch. D. 587; 45 L. J. Ch. 699.

(*u*) Per Jessel, M.R., in *Mayd* v. *Field* (*ubi sup.*).

settled on her for her life, with power to dispose of it by deed or will; of course where there is no restraint on anticipation it is separate property, so as to be subject to such engagements" (*x*).

Particular Power.—This rule has been applied where a particular power has been conferred upon a married woman, even where restrained from anticipating; for where a married woman tenant for life, without power of anticipation, had a special and particular power to direct repairs to be done and charged upon her estate, and she employed a person to execute them, she was held liable to pay the amount incurred, which was to be raised by a charge on her estate (*y*); and it is immaterial whether the estate precedes the power or the power the estate (*z*). This view is not really easy to reconcile with the principle of the decision in *Pike* v. *Fitzgibbon* (*a*) before the Married Women's Property Act, 1882, and in *Palliser* v. *Gurney* (*b*), after that Act; viz., to render the contract of the married woman valid and binding she must possess free separate property at the time of entering into it; for, if at such a time she had no other property than that over which she possessed this general power of appointment, strictly speaking she was without any property at all, for the power over property is quite distinct from property itself (*c*).

What Limitations Render Property Liable. — Property subject to the power is liable for her debts: (a) Where the limitations are to her for life for her separate use without restraint upon anticipation with remainder as she may appoint by deed or will, with remainder to her heirs or assigns, or executors and administrators (as the case may be) (*d*); and where the limitations are the same but are contingent on the happening of a certain event which has taken place, for such limitations amount to an absolute interest in the property (*e*); (b) where the limitations are to her for life for her separate use without restraint upon anticipation with remainder as she may appoint by deed or will, with remainder to third persons who are volunteers, and she executes the power in such a way as to

(*x*) *Per* Jessel, M.R., in *Mayd* v. *Field*, 45 L. J. Ch. 704.
(*y*) *Skinner* v. *Todd*, 51 L. J. Ch. 198.
(*z*) *Mayd* v. *Field*, 3 Ch. D. 587; 45 L. J. Ch. 699.
(*a*) 17 Ch. D. 454; 50 L. J. Ch. 394.
(*b*) 19 Q. B. D. 519; 56 L. J. Q. B. 546.
(*c*) *Nail* v. *Punter*, 5 Sim. 555; *Re Armstrong, Ex parte Gilchrist*, 17 Q. B. D. 521; 55 L. J. Q. B. 578.
(*d*) *London Chartered Bank of Australia* v. *Lemprière*, L. R. 4 P. C. 572; 42 L. J. P. C. 49.
(*e*) *Mayd* v. *Field* (*ubi sup.*).

make it her own separate estate, and previously to the accruing of the liabilities (*f*); (c) where the power of appointment is by will only, and the power is exercised in favour of her creditors, as by charging the property subject to the power with the payment of her debts (*g*).

What Limitations do not.—But the property is not subject to the payment of her debts and liabilities, where (a) there is a limitation to third persons in default of appointment and the power has not been exercised (*h*); (b) where the power is to be exercised by will only, and has been exercised by her but not for her creditors. The law on this subject has been quite unsettled. The cases of *Hughes* v. *Wells* (*i*), *Re Harvey's Estate*, *Godfrey* v. *Harben* (*k*), and *Hodges* v. *Hodges* (*l*), were to the effect that it was liable; while *Sockett* v. *Wray* (*m*), *Vaughan* v. *Vanderstegen* (*n*), and *Shattock* v. *Shattock* (*o*), were to the opposite effect. Lastly, in *Re Roper, Doncaster* v. *Roper* (*p*), Kay, J., decided that a mere power is neither "property" nor "separate property," and held that the execution of a power of appointment by will over a fund by a married woman did not render it liable to satisfy her obligations incurred before the execution of the power and the date of the coming into force of the Married Women's Property Act, 1882. He also doubted whether, if such debts or obligations had been contracted after section 4 of the Act had come into force, but before the execution of the power by the married woman, the execution would have rendered the appointed property liable for debts incurred before the execution of the power, because it is the execution of the power that renders the fund liable. If the married woman possessed no free separate property at the time of incurring liabilities, even assuming the appointed fund to be separate property subsequently acquired, it would not be bound because she was under no valid or effective liability (*q*).

(*f*) Farwell, on Powers (2nd edit.) 263. See *Re Roper, Doncaster* v. *Roper*, 39 Ch. D. 482; 58 L. J. Ch. 215.

(*g*) *Owens* v. *Dickenson*, 4 Jur. 1151. *Re De Burgh Lawson, De Burgh Lawson* v. *De Burgh Lawson*, 41 Ch. D. 568; 58 L. J. Ch. 561.

(*h*) See *Nail* v. *Punter* (*ubi sup.*); *Johnson* v. *Gallagher*, 30 L. J. Ch. 298; per Turner, L.J.

(*i*) 9 Ha. 749.

(*k*) 13 Ch. D. 216; 49 L. J. Ch. 3.

(*l*) 20 Ch. D. 749; 51 L. J. Ch. 549.

(*m*) 4 Bro. C. C. 483.

(*n*) 2 Dr. 363; 23 L. J. Ch. 793.

(*o*) L. R. 2 Eq. 182; 35 L. J. Ch. 509.

(*p*) 39 Ch. D. 482; 58 L. J. Ch. 215.

(*q*) *Pike* v. *Fitzgibbon*, 17 Ch. D. 454; 50 L. J. Ch. 394.

This case must be taken to have settled the law in regard to instances not affected by the Married Women's Property Act, 1882.

Married Women's Property Act, 1882.—Section 4 of that Act provides that "the execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act." These words are wide enough to make the property over which a married woman has exercised her power by will liable to satisfy her liabilities, even when, at the time of incurring them, she had no free separate property (*r*). The intention to exercise the power, though the purpose for which it was exercised fails, renders the execution effective, and the property subject to it liable for general debts (*s*).

Married Women's Property Act, 1893.—Under the Married Women's Property Act, 1893 (*t*), this question is set at rest; for as under the above section of the Act of 1882 the execution of a power renders the appointed fund liable as though it were separate property, and such would be subsequently acquired property if execution followed the incurring of the liability; now, under sub-section (a) of section 1 of the Act of 1893, the existence of separate property at the time of incurring a debt or liability is not necessary to render subsequently acquired property liable to make good such liability, and it is immaterial whether the execution of such power precedes or not the incurring of the liability; consequently if a married woman having a general power of appointment over property by will only contracts debts and executes the power by her will, such property will become bound to satisfy her debts.

Direction to Pay Debts.—Where a married woman in executing the power directs that her debts shall be paid out of the appointed fund, the fund becomes assets for that purpose, though at the time of contracting the debts she was restrained from anticipating, and had no free separate property (*u*); but even where she does not so charge the appointed fund with the payment of debts or funeral expenses, but exercises her power of

(*r*) *Re Ann, Wilson* v. *Ann*, [1894] 1 Ch. 549; 63 L. J. Ch. 334. It is clear that if at the time of entering into her liabilities she has free separate property, her execution of the general power of appointment by will renders the property bound.

(*s*) *Re Hodgson, Darley* v. *Hodgson*, [1899] 1 Ch. 666; 68 L. J. Ch. 313.

(*t*) 56 & 57 Vict. c. 63, s. 1, sub-s. (a).

(*u*) *Re De Burgh Lawson, De Burgh Lawson* v. *De Burgh Lawson*, 41 Ch. D. 568; 58 L. J. Ch. 561.

appointment over it, her husband, if executor, will be entitled to charge her funeral expenses against the appointed fund (*x*).

Ante-nuptial Obligations.—A fund over which a married woman possesses a general power of appointment which is executed by her, is liable to satisfy her *ante-nuptial* obligations (*y*). Though the Court will not decree specific performance of a covenant or contract to leave property by will entered into by a mere donee of a testamentary power of appointment, yet the covenantors are entitled to recover by way of damages from those in whose favour the married woman has executed the power in breach of her contract to the extent of the assets which would have come into the hands of the covenantors if the appointment had been actually made in their favour (*z*).

By Whom Fund Appointed by Will Receivable.—If the power is exercised by her will, the property affected by it is properly receivable, as the case may be, by her executor (*a*), or her administrator with the will annexed (*b*).

Section 6.

Questions between Husband and Wife as to their Property.

In case any disputes arise between husband and wife as to what is or is not their respective property, or between husband and wife and any bank, corporation, company, or society in whose books the property in dispute is standing, a summary method of dealing with and settling them is provided by the Act of 1882 (*c*), which somewhat extends the provisions of section 9 of the Married Women's Property Act, 1870. The husband or wife, or the bank, corporation, &c., affected, "may apply by summons or otherwise in a summary way, to any judge of the High Court of Justice in England, . . . or (at the option of the applicant, irrespectively of the value of the property in dispute) . . . to the judge of the County Court of the district, . . . and the judge of the High Court of Justice, or of the County Court . . . (as the case may be), may make such order with respect to the property in dispute, and as to the

(*x*) *Re McMyn, Lightbown* v. *McMyn*, 33 Ch. D. 575; 55 L. J. Ch. 843.
(*y*) *Re Parkin, Hill* v. *Schwarz*, [1892] 3 Ch. 510; 62 L. J. Ch. 55.
(*z*) *Ibid*, and see *Cavendish Browne's Settlement, Horner* v. *Rawle* (1916), W. N. 341; 61 Sol. J. 27.
(*a*) *Re Hoskins' Trusts*, 6 Ch. D. 281; 46 L. J. Ch. 817.
(*b*) *Re Peacock's Settlement, Kelcey* v. *Harrison*, [1902] 1 Ch. 552; 71 L. J. Ch. 325.
(*c*) 45 & 46 Vict. c. 75, s. 17.

costs of and consequent on the application, as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit" (*d*). The application may be heard by the judge, &c., in his private room. The registrar of the Court of Probate has no jurisdiction to make the order (*e*); but the claim by either spouse may be referred to him for his report by the judge of the Probate Court (*f*).

The position of the bank, corporation, &c., affected by the dispute is that of a stakeholder only.

Now that all kinds of property, whether of much or little value, coming to a married woman form her separate estate, this section is likely to prove of considerable importance and application. It is intended to be applied where one of the spouses claims the title to or possession of property which is denied by the other, the one seeking to attach to it the quality of separate estate, and the other asserting that it is his property, unaffected by the rights of his wife. The questions most likely to arise are in cases where the husband, married to his wife before the Married Women's Property Act, 1882, alleges that a fraud was committed on his marital rights by his wife having withdrawn from him and settled property to which he was entitled. Also, in cases unaffected by the Act, where the husband reduces choses in action of the wife into possession, and she claims to be entitled to her equity to a settlement (*g*); also, such questions as whether the husband has or has not effectually reduced the wife's choses in action into possession. Also, where there have been savings by the wife, claimed by her as her own, and alleged by the husband to be the proceeds of his own property, and to which his wife has no title, or where moneys have been appropriated by the wife without her husband's consent. The savings of a wife from an allowance made to her by her husband for household purposes are not the moneys of the wife (*h*), and cannot without his consent be invested to her separate use (*i*), unless she be living separate from him (*k*);

(*d*) There are provisions in the section enabling the order of the judge, &c., to be appealed from, as in ordinary matters, and for removal by *certiorari* of the proceedings in the County Court . . . . to the High Court.

(*e*) *Wood* v. *Wood and White*, 14 P. D. 157; 58 L. J. P. 68.

(*f*) See *Tasker* v. *Tasker*, [1895] P. 1; 64 L. J. P. 36.

(*g*) For the right of the wife to an equity to a settlement, see chap. VIII.

(*h*) *Montgomery* v. *Blows*, [1916] 1 K. B. 899; 85 L. J. K. B. 794.

(*i*) *Barrack* v. *M'Culloch*, 5 W. R. 38.

(*k*) *Brooke* v. *Brooke*, 31 L. T. (o.s.) 244.

and where she is so living apart from him, he cannot recover them from her during her lifetime (*l*), but after her death he can claim them (*m*). So where after marriage moneys of the husband have been similarly appropriated without his consent, such moneys, and all investments thereof, will remain in equity his property (*n*). So also where a wife improperly sold chattels of her husband while he was insane and applied the proceeds to her own use his representatives recovered the value after her death from her estate (*o*). Proof by the wife that the proceeds were derived from her separate estate throws the burden of proof that they were the husband's on his representatives (*p*).

Income Tax on Wife's Profits.—For the purposes of income tax the profits of any married woman living with her husband shall be deemed the profits of the husband, and the same shall be charged in the name of the husband, and not in her name or that of her trustee (*q*). Where, therefore, husband and wife are in the receipt of a joint salary, the profits of the wife were rightly charged as the profits of the husband, and no deduction for the purpose of abatement or exoneration could be made, notwithstanding the Married Women's Property Act, 1882 (*r*). It has been the practice of the Inland Revenue Department to treat the separate "profits" (including therein "income") of a married woman as part of the income of the husband where they were living together (whether such income was derived from business profits or investments), though to do so now is contrary to the spirit and letter of the Married Women's Property Act, 1882. There was a partial recognition of this fact in the Finance Acts, 1894 (*s*) and 1897 (*t*); thus, under the earlier Act (*tt*) a separate income from some profession, employment, or vocation, or from any office or employment of profit, and the joint income of herself and her husband, whether by way of assessment or deduction, did not exceed £500, the claim of each for exemption or abatement was to be treated separately. This provision, however, allowed the revenue authorities to treat after the abatement the several incomes as one and indivisible,

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(*l*) *Brooke* v. *Brooke*, 31 L. T. (o.s.) 244.
(*m*) *Messenger* v. *Clarke*, 19 L. J. Ex. 306.
(*n*) *Barrack* v. *M'Culloch* (*ubi sup.*).
(*o*) *Williams* v. *Stretton*, 50 L. J. Ch. 495.
(*p*) *Ibid.*
(*q*) 5 & 6 Vict. c. 35, s. 45.
(*r*) *Bowers* v. *Harding*, [1891] 1 Q. B. D. 560; 60 L. J. Q. B. 474.
(*s*) 57 & 58 Vict. c. 30.
(*t*) 60 & 61 Vict. c. 24, s. 5. (*tt*) Sect. 34, sub-s. 2.

and charge the tax on the joint total. But the Finance Act of 1897 (*u*), and now the Income Tax Act, 1918 (*x*), carry further the relief of a married woman, whose income jointly with that of her husband does not exceed £500; for where the total joint income of a husband and wife charged to income tax, by way either of assessment or deduction, does not exceed £500, and such income includes profits of the wife from any business (*y*) carried on or exercised by means of her own personal labour, and the rest of the total income, or any part thereof, arises or accrues from profits of the husband unconnected with the business of the wife, the general commissioners shall deal with the claim as if it were a claim in respect of the said profits of the wife, and a separate claim on behalf of the husband in respect of the rest of the total income. If, however, the husband derives an income from his wife's business, it is to be treated as part of her income. This latter provision puts husband and wife on an equality up to the £500 limit; for formerly the wife's income from whatever source derived was added to the husband's; now if the business is principally the wife's, his profits derived from it are to be added to and treated as hers.

Estate Duty.—Under the Finance Act of 1894, if a husband or wife is entitled, either solely or jointly with the other, to the income of any property settled by the other under a disposition which has taken effect before the Act came into force, and on the death of one of them the survivor becomes entitled to the income of the property settled by such survivor, estate duty is not payable in respect of such property until the death of the survivor. But this exemption from the operation of the Act does not apply where husband or wife takes the *corpus* as well as the income on the death of the other spouse (*z*).

Section 7.

Pin-money and Paraphernalia.

Pin-money.—The law on the subject of pin-money may well be treated of under the heading of separate estate, for though not separate estate in the full legal intendment of that phrase,

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(*u*) 60 & 61 Vict. c. 24, s. 5, sub-s. 2.
(*x*) 8 & 9 Geo. V. c. 40, s. 21.
(*y*) "Business" here means any profession, trade, employment or vocation, or any office or employment of profit.
(*z*) *Att.-Gen.* v. *Strange*, [1898] 2 Q. B. 39; 67 L. J. Q. B. 629.

yet it partakes somewhat of its nature. Its importance has diminished as that of separate estate has increased, and it is now almost entirely merged in the latter (*a*).

The following description and remarks show the shadowy nature of the distinction between pin-money and separate estate. "Pin-money is with respect to the personal expense of the wife, for the dress and pocket-money of the wife; its very name implies a connection with the person; it means that which goes to deck the person of the wife; and, as I should say, upon a somewhat larger construction, to pay her ordinary expenses. It is a fund which she may be made to spend during the coverture by the intercession and advice, and at the instance of her husband" (*b*). "You cannot get from the books even a definition of pin-money upon which you can rely; you cannot trace the line which divides it from the separate property of the wife with any distinctness; and as to authority, either as to decisions or dicta of text-writers, or of judges, there is nothing that furnishes a clear and steady light on the subject, many cases running from pin-money into separate estate, and from separate estate into pin-money, in such a way that when a text-writer quotes a case, *Brodie* v. *Barry* (2 Ves. & B. 36; 2 Rop. H. & W. 133) for instance, in support of a doctrine touching pin-money, you look at the book, and find it has nothing to do with pin-money, and does not support the proposition for which it is cited" (*c*).

A rough distinction may be drawn between pin-money and separate estate on the basis of the application and destination of the property. Where the amount settled on the wife is specifically described as pin-money, or from the words used can be taken to be of the nature of pin-money, then it will be so held to be. Pin-money may be taken to be that competency settled upon a woman to be employed by her in the ornament and decoration of her person, and general expenses incidental to the position of one having considerable control over the family and household arrangement; and where the settled fund is pin-money, there seems to be a *duty* on the wife to devote it to the objects for which it was secured to her apart from her husband's control. It is otherwise with separate estate which belongs to her absolutely, while pin-money does not (*d*).

(*a*) In America it is of little practical importance. Bish. Laws of Married Women, s. 229.

(*b*) Per Lord Brougham, C., in *Howard* v. *Digby*, 2 Cl. & F. 634, 677.

(*c*) *Ibid.* 2 Cl. & F. 670.

(*d*) *Howard* v. *Digby* (*ubi sup.*).

Another distinction is observable in the matter of arrears. Where it is pin-money, the wife cannot claim for more than the arrears of one year, or a year and a fraction, preceding the husband's death, and her representatives not at all, though she may have been insane for many years, and it was secured by an ante-nuptial settlement; whereas if it be separate estate, her right of recovery and that of her representatives is not so limited (*e*). So, too, a wife is unable to assign or effectually dispose of her pin-money, whereas over her separate property she has a complete right of disposition, unless specifically restrained.

Savings.—If the allowance given by the husband for pin-money, or separate maintenance, has been so ample as to enable the wife to accumulate savings out of it, these, with whatever she may have purchased with them, will be at her own disposal by will or otherwise (*f*). But to render her claim to the savings indefeasable, the property so acquired by the wife must have been either settled on her as her separate property, or the husband must clearly have engaged to hold it as trustee for her separate use (*g*).

Arrears.—The principle upon which the wife's right to arrears is limited is, that it is a fund which the husband has agreed to provide for a specific purpose, namely, the suitable support of his wife, and if there are arrears of it, it is presumed that she has been furnished from time to time by her husband with the necessary means for providing those things which it was intended should be provided by the pin-money, and so the husband might be saddled with a double liability, for he would be liable not only to pay her debts, but also to satisfy her claims against him for pin-money; accordingly, she is prevented from claiming arrears for a longer period than a year, or a year and a fraction of a year. If her husband has provided her with

(*e*) *Howard* v. *Digby* (*ubi sup.*). Lord St. Leonards (in his Law of Property as administered in the House of Lords, pp. 166 *et seq.*) doubts the correctness of this decision. On this point he lays down the right principle to be that where the husband, bound by the terms of his settlement to allow his wife's pin-money, does not for some reason or other pay it to her, but spends it in the manner in which it would have been spent by the wife if she had had control of the money, *e.g.*, in paying her personal and household expenses, in subscriptions to charities which she was in the habit of supporting, and the like, all such legitimate payments ought to be set off against any claim by the wife for arrears. His Lordship adds that the refusal of the House of Lords to entertain the claim of the wife's representatives, at any rate for the arrears of a year, was not supported by the principles of equity, or of the decided cases, for what the wife could rightly claim her representative was empowered to demand.

(*f*) *Sir Paul Neal's Case*, Prec. Ch. 45.

(*g*) *M'Lean* v. *Longlands*, 5 Ves. 79.

dress, &c., she cannot recover at his death even a year's arrears (*h*). This presumption is, however, negatived where she has lived with him, and payment has been frequently demanded of him, and he has promised to satisfy her demands (*i*); or she has been dwelling apart from him, and without having any allowance made her (*k*). Under these circumstances an account will be decreed as far back as the arrears go.

Paraphernalia.—The term "paraphernalia" (*bona paraphernalia*) is derived from the Greek word παράφερνα, and signifies something reserved to the wife over and above her dotal portion. It includes the personal apparel and ornaments possessed and used by her during coverture, and which are suitable to her rank and condition in life (*l*). The question of paraphernalia can only arise on the death of the husband; and herein lies a marked distinction between what is paraphernalia and what is separate property. As to personal ornaments, the husband's possession of them makes no difference, provided the wife wore them at intervals; it is enough if she used them from time to time, such as birthdays (*m*), or on public occasions (*n*). Their value is immaterial, so long as they are suitable to her rank and degree (*o*). But the widow cannot claim as paraphernalia articles which are in fact heirlooms (*p*), such as old family jewels of her husband's family which she has been allowed to wear (*q*).

She is entitled to retain her paraphernalia for her own use, on the principle that the death of her husband should not leave her without the ordinary necessaries of life, or surroundings, suitable to her rank and condition. At law her husband may dispose of his wife's paraphernalia, excepting her necessary apparel, and with like exception they are liable to the claims of his creditors (*r*). The husband cannot "devise by his will such ornaments and jewels of his wife (*s*), though during his life he hath the power (if unkindly inclined to exert it) to sell

(*h*) *Fowler* v. *Fowler*, 3 P. Wms. 355; see also *Howard* v. *Digby* (*ubi sup.*).
(*i*) *Aston* v. *Aston*, 1 Ves. 267.
(*k*) *Ridout* v. *Lewis*, 1 Atk. 269.
(*l*) 2 Bl. Com. 435.
(*m*) *Northey* v. *Northey*, 2 Atk. 77.
(*n*) *Graham* v. *Lord Londonderry*, 3 Atk. 393.
(*o*) *Northey* v. *Northey* (*ubi sup.*)
(*p*) *Calmady* v. *Calmady*, 11 Vin. Abr. pl. 21; *Jervoise* v. *Jervoise*, 17 Beav. 566.
(*q*) *Laing* v. *Walker*, 64 L. T. 527.
(*r*) *Graham* v. *Lord Londonderry* (*ubi sup.*).
(*s*) *Tipping* v. *Tipping*, 1 P. Wms. 729.

them or give them away" (*t*). Thus, they are not to be considered as belonging to the wife during coverture for her separate use, for her right of property in them does not vest in her till the death of her husband (*u*). The right of the wife to her paraphernalia is purely personal, and if she does not make the claim to them in her lifetime, no right will vest in her executor or administrator (*x*) and her right may be barred by a provision before marriage in lieu of it (*y*).

Distinction between Paraphernalia and Separate Estate.—There is a distinction upon this subject of paraphernalia which is entitled to consideration. Where the husband, either before or after marriage, gives to his wife articles of paraphernal nature, they are not treated as absolute gifts to her as her own separate property; for if they were, she might dispose of them at any time, and he could not appropriate them to his own use. But they are deemed as, technically, paraphernalia to be worn by the wife as ornaments of her person; and so to be deemed gifts *sub modo* only (*z*). But, if the like articles were bestowed upon her by a father or by a relative, or even by a stranger, before or after marriage, they would be deemed absolute gifts to her separate use; and then if received with the consent of her husband, he could not, nor could his creditors, dispose of them any more than they could of any other property received and held to her separate use (*a*). So, too, wedding presents given to a woman in contemplation of marriage belong to her for her separate use, and will not pass on the bankruptcy of her husband to his trustee unless it is clear that they were intended to be given to the husband so as to be liable for his debts (*b*). But if proof is forthcoming that the husband made to his wife gifts of jewellery and other matters of personal adornment to be her own separate property, he will not be entitled to recall them (*c*).

Notwithstanding the change effected by the Married Women's

(*t*) 2 Bl. Com. 436.
(*u*) *Ridout* v. *Earl of Plymouth*, 2 Atk. 104.
(*x*) *Clarges* v. *Duchess of Albemarle*, 2 Vern. 245.
(*y*) *Read* v. *Sewell*, 2 Atk. 642.
(*z*) *Graham* v. *Lord Londonderry* (*ubi sup.*).
(*a*) Story, Eq. Jur. s. 1377. Of course jewels and other personal ornaments settled to the wife's separate use, and forming part of the separate estate, will be liable to be taken in execution by her own creditors. *Mercier* v. *Williams*, 9 Q. B. D. 337; 10 App. Cas. 1; 51 L. J. Q. B. 594. See *Grant* v. *Grant*, 34 L. J. Ch. 641; and chap xiv., Contracts by Married Women, sub-s. 2, Gifts between Husband and Wife.
(*b*) *Re Jamieson, Ex parte Pannell* v. *Jamieson*, 60 L. T. 159.
(*c*) *Bashall* v. *Bashall*, 11 Times Rep. 152.

Property Act, 1882, in this branch of the law, if an express gift is made by a husband to his wife of jewels and other personal ornaments to be worn by her as his wife, such ornaments would be deemed to be "paraphernalia" only; for that Act has not abolished the general law affecting paraphernalia (*d*). But, as before pointed out, nowadays a gift from husband to wife will *prima facie* be deemed a gift out and out to the wife's separate use, and none of the attributes of "paraphernalia" would be held to attach to it (*e*). But whether such gifts are to be treated as out and out presents to the wife or as paraphernalia will depend upon the facts of each case.

When Assets of Husband Marshalled in Favour of Wife.—The widow's paraphernalia are liable to satisfy the debts of her deceased husband if his assets prove insufficient to meet them (*f*), even though they had been given to her before marriage (*g*). If the husband had not disposed of the paraphernalia absolutely, as he might do, but has merely given them in pledge, after his debts have been provided for, she will be entitled to have his assets applied to the redemption of the articles so pledged (*h*). If it has become necessary to resort to the paraphernalia to pay the husband's debts, the wife will be a creditor for their value, and his assets will be marshalled in her favour (*i*). "The widow of a deceased person is entitled to her paraphernalia without regard to any bequest of them which her husband may have made, but subject to the payment of his debts. If, therefore, any creditor should have seized upon the wife's paraphernalia, equity, out of regard for her claims, will so marshal the assets as to allow her to be recouped out of *any part* of her husband's property (*k*). The wife's right to paraphernalia is superior to the claims of legatees, which are merely voluntary (*l*).

(*d*) *Tasker* v. *Tasker*, [1895] P. 1; 64 L. J. P. 36.
(*e*) *Tasker* v. *Tasker* (*ubi sup.*). See *Bashall* v. *Bashall* (*ubi sup.*).
(*f*) *Boyntun* v. *Boyntun*, 1 Cox, Eq. Cas. 106.
(*g*) *Ridout* v. *Lord Plymouth* (*ubi sup.*).
(*h*) *Graham* v. *Lord Londonderry* (*ubi sup.*).
(*i*) *Aldrich* v. *Cooper*, 8 Ves. 397.
(*k*) *Northey* v. *Northey* (*ubi sup.*), as against the heir taking by descent; *Snelson* v. *Corbet*, 3 Atk. 369, and devisees of land devised for payment of debts; *Boyntun* v. *Boyntun* (*ubi sup.*).
(*l*) See *Tipping* v. *Tipping*, 1 P. Wms. 729, and *Graham* v. *Lord Londonderry*, 3 Atk. 393.

CHAPTER XIV.

ACTIONS BY AND AGAINST HUSBAND AND WIFE.

SECTION 1.

Actions by Husband and Wife.

Joint Actions.—Joint actions were formerly brought in two cases—(a) in suits in which the husband was necessarily joined as a party, or where the wife might be joined, as being what was styled "the meritorious cause of action," or where the cause of action would have survived to her (*a*), as in the case of contracts made by her before her marriage (*b*), or where the action was brought for the recovery of her real estate, or in any case involving her title to it (*c*); (b) in suits in which the wife claimed as executrix or administratrix (*d*) or trustee, or in an action to enforce a claim for a tort committed against her person or reputation (*e*), either before or during marriage.

An alteration in the law in this respect has been brought about by the Married Women's Property Act, 1882, for now the husband need never be joined for mere conformity (*f*), and the wife can sue alone in her representative capacity (*g*). An action is no longer abated by reason of the marriage of a woman *pendente lite*, but if the cause of action survive, it shall survive to her solely, or to her and those jointly interested with her in the subject-matter of it (*h*).

Of course, joint actions may be brought by husband and wife where they are both jointly interested in the matter in dispute. The husband's interest in the wife's cause of action does not now arise from any marital right he may possess over it, but from a

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(*a*) *Fosdike* v. *Sterling*, 1 Freem. 236.
(*b*) *Philliskirk* v. *Pluckwell*, 2 M. & S. 393.
(*c*) 1 Selw. N. P. 243.
(*d*) In such a case the husband had no beneficial interest in the action. See *Vint* v. *Hudspith*, 30 Ch. D. 24; 54 L. J. Ch. 844.
(*e*) Dicey, Part. 174. See *Weldon* v. *Winslow*, 13 Q. B. D. 784; 53 L. J. Q. B. 528; *Dengate* v. *Gardiner*, 4 M. & W. 5; *Longmeid* v. *Holliday*, 6 Exch. 761. See *ante*, p. 155.
(*f*) Sect. 1, sub-s. 2.
(*g*) Sect. 18.
(*h*) R. S. C. 1883, Ord. XVII. rr. 1, 4; *Darcy* v. *Whittaker*, 24 W. R. 244.

bargain made with her, whether before or after marriage, which gives him an interest in it, as where he has become a purchaser by the settlement of his wife's choses in action, or where they have entered jointly into a contract which affects his estate as well as her separate property. Where he establishes such joint interest, he will be entitled to bring the action jointly with his wife. So, if in the opinion of the Court or a judge, the addition of the husband is necessary for the complete adjustment of all questions involved in the action, or in the event of the death of the wife and the cause of action surviving, he can be added (*i*).

Joint Claims Added to Separate Claims.—Claims by husband and wife may be joined with claims by either of them separately (*k*). In the Common Law Courts before the Judicature Act this could not be done, except to the limited extent authorized by the Common Law Procedure Act, 1852 (*l*), by which in an action by a man and his wife for an injury done to his wife, where she was necessarily joined as co-plaintiff, the husband might add claims in his own right. Even before the Judicature Act these claims were not confined to claims arising consequentially from the injuries done to the wife (*m*). Thus, in an action for slander of the wife, her husband, when joined as a party to the suit, might have added in their joint claim a special claim for any special damage that might have accrued to him through the tort done to his wife; as, for instance, in a case where his wife had been personally assaulted, and he had been deprived of her society and comfort; and this equally applied where the wife's state of health had been affected by a libel. But now this right of the husband to join in actions which are his wife's is applicable only to post-nuptial and not ante-nuptial torts done to her; for he has no need now to be joined as plaintiff for mere form's sake in tort any more than in contract (*n*). If husband or wife is required to be a party to the action by the other, he or she can be added (*o*).

Costs.—Under the present practice, if a husband needlessly join himself as a plaintiff, he will not recover his personal costs in the action in which his wife might be successful, and if he put the defendant to unnecessary cost in respect of his mis-

(*i*) R. S. C. 1883, Ord. XVII. r. 2.
(*k*) *Ibid.* Ord. XVIII r. 4.
(*l*) 15 & 16 Vict. c. 73, s. 40.
(*m*) See *Hemstead* v. *The Phœnix Gaslight and Coke Co.*, 34 L. J. Ex. 108.
(*n*) 45 & 46 Vict. c. 75, s. 1, sub-s. 2; 56 & 57 Vict. c. 63, s. 1. See *ante*, chap. xii.
(*o*) R. S. C. 1883, Ord. XVI. r. 11.

joinder, he personally, or his wife's separate estate, will be liable for the costs so incurred.

Where the husband's and wife's interests in legal proceedings are practically one and the same, and they bring separate actions to enforce their rights, the Court has power to order that only one set of costs shall be paid in respect of the separate actions (*p*).

In the case where husband and wife are co-plaintiffs in a partition action the consent of the latter to a sale should be evinced by her request to her solicitor authorizing him to instruct counsel to consent to the sale (*q*). Where, though the action is joint, the wife is the substantial plaintiff, the costs of it, if unsuccessful, may be ordered to be paid out of the wife's estate though subject to restraint against anticipation under section 2 of 56 & 57 Vict. c. 63 (*r*).

Set-off.—Where the husband and wife sue jointly, the defendant will be entitled to set off any claims that he may have against either of them separately, because they now sue on a common cause of action; and the rights of all the parties can be adjusted in one and the same action. In such joint action the wife is treated as a separate person from her husband. Consequently a joint affidavit as to documents in their joint custody is insufficient, and each must make an affidavit as to such in the individual custody or possession of each of them (*s*).

Effect of Death.—On the death of the husband in cases where both he and his wife were necessary co-plaintiffs, the action would survive to the wife, unless any circumstances had deprived her in the meantime of the right to carry it on. On the death of the wife in cases where the husband's interests were not affected by her death, or where by some act he had become absolutely entitled to the subject-matter of the action, the right to carry it on would survive to him. If, on the contrary, his interest terminated, the action would survive to her legal personal representative (*t*).

Since it has been held that women married before the Act of 1882 came into force can sue alone in respect of causes of action (whether in contract or in tort) which arose previously to the coming in force of the Act, it would be of no practical utility

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(*p*) *Heimbs* v. *Newcastle Co-operative Society*, 76 L. T. 109.
(*q*) *Grange* v. *White*, 18 Ch. D. 612; 50 L. J. Ch. 620.
(*r*) *Marchioness of Huntly* v. *Gaskell*, [1905] 2 Ch. 656; 75 L. J. Ch. 66.
(*s*) *Fendall* v. *O'Connell*, 29 Ch. D. 899; 54 L. J. Ch. 756.
(*t*) 45 & 46 Vict. c. 75, s. 23.

to proceed further with the earlier law on the subject of joint actions by husband and wife.

Actions by Husband Alone.—The fact of marriage never placed the husband under any disability in respect of his capacity to bring actions; and his right of action never abated by reason of his marriage.

Contract.—A husband might formerly have sued alone (or jointly with his wife) in three cases: (i) on negotiable instruments given to his wife before marriage; (ii) on contracts made after marriage with his wife alone; (iii) on contracts made after marriage with himself and his wife (*u*). Now, since the passing of the Married Women's Property Act, 1882, he cannot sue at all in the first case, unless he has by a marriage settlement purchased an interest in them, and in actions brought to recover on them his wife must be joined as a plaintiff. As regards the second case, a married woman, under the Married Women's Property Act, 1882, except with reference to her separate property, has not the capacity to make a contract except as agent, whether on behalf of her husband, or some third person, therefore such principal must sue on her contract in his own name; thus, if the wife lend money which is not her own, during the coverture, the husband alone must sue for it (*x*). If it is a contract which concerns only her separate estate, it is otherwise, and the husband has no interest in it. As regards the third case, where the husband and wife enter into a contract which in no way concerns her separate property, or is one into which she cannot validly enter, as where she is restrained from anticipating, it would seem that the husband must sue alone. If the wife be improperly joined, the action shall not be defeated, and the Court at any stage of the proceedings may make an order striking out her name (*y*).

Tort.—There does not seem to be anything in the Married Women's Property Act, 1882, which would prevent a husband from suing alone in respect of a tort done to his wife, if he framed his action as one for damages as compensation for the loss sustained by him in being deprived of the society, comfort, and assistance of his wife (*z*). It would probably be held that the husband might sustain such sole action if the defendant were not likely to be injured by another action being tried separately

(*u*) Dicey, Part. 181.
(*x*) *King* v. *Bassingham*, 8 Mod. 199.
(*y*) R. S. C. 1883, Ord. XVI. r. 11.
(*z*) See *Hyde* v. *Scyssor*, Cro. Jac. 538.

at the instance of the wife. But his right to sue for the tort as a tort done to his wife is now by implication taken away from him (*a*).

Execution.—Where a husband is entitled or liable to execution upon a judgment or order for or against a wife, the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution on such judgment, and the Court may make an order to that effect (*b*).

Actions by Wife Alone. Until recent changes in the law, a married woman could not alone, and without joining her husband, bring an action at law, except under certain circumstances, of which the following are examples: (i) Where her husband was *civiliter mortuus*; (ii) where he was an alien and had left the kingdom, or had never been in this country; (iii) where she had been judicially separated, or had obtained a protection order (*c*), in which case she might sue as well in tort as in contract (*d*). Even where she was the meritorious cause of action, her husband had to be joined, if only for form's sake. In equity she could bring a suit alone when possessed of separate property, and the burden of proving that she was possessed of it lay upon her. In such an action she had to sue by her next friend, and make her husband a defendant (*e*).

Her capacity for suing was extended by the Married Women's Property Act, 1870, to property which was declared by the Act to be her separate property, and to property belonging to her before marriage, which her husband had, by writing under his hand, agreed with her should belong to her as her separate property (*f*). But where she sued in respect of her other separate estate, she still had to sue by her next friend, making her husband a defendant (*g*). Where the married woman is an infant (and only because she is an infant) she will still require a next friend to be joined with her in bringing actions, and the next friend and herself will be subject to the rules and regulations affecting infant plaintiffs and their next friends (*h*). Under the Judicature Act married women might by leave of the Court

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(*a*) Sect. 1, sub-s. 2.
(*b*) R. S. C. Ord. XLII. r. 23.
(*c*) 20 & 21 Vict. c. 85, ss. 21, 25, 26: 21 & 22 Vict. c. 108, ss. 6-8.
(*d*) *Ramsden* v. *Brearley*, L. R. 10 Q. B. 147; 44 L. J. Q. B. 46.
(*e*) *Wake* v. *Parker*, 2 Keen, 59; *Holmes* v. *Penney*, 3 K. & J. 90; 26 L. J. Ch. 179.
(*f*) 33 & 34 Vict. c. 93, s. 11; *Summers* v. *City Bank*, L. R. 9 C. P. 580; 43 L. J. C. P. 261.
(*g*) *Roberts* v. *Evans*, 7 Ch. D. 830; 47 L. J. Ch. 469.
(*h*) Dan. Ch. Pr. 139. See *post*, Part IV. chap. vii.

or a judge sue without their husbands, and without a next friend, if they gave security for costs to the satisfaction of the Court or judge (*i*). In all other cases they were obliged to sue as co-plaintiff's with their husbands or next friends.

Married Women's Property Act, 1882.—Since the coming into force of the Married Women's Property Act, 1882, there has been a complete change in this branch of the law; for it is now provided that "a married woman shall be capable of suing . . . either in contract or tort, or otherwise in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff . . . or be made a party to any action or other legal proceeding brought by . . . her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property" (*k*). Further, "a married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue . . . in that character without her husband, as if she were a *feme sole*" (*l*). She need not describe herself as a married woman, or allege that she is suing in respect of her separate estate (*m*).

It has been decided that a woman married before the above Act came into operation may now sue alone both in contract (*n*) and in tort (*o*), and in her own and a representative right in respect of a cause of action which arose before the Act came into force, as though she were a single woman. Leave to sue alone is not required of her; and she cannot be compelled to give security for costs, because she does sue alone (*p*), even where her separate property is subject to restraint (*q*), or she has no separate estate at all at the time of bringing the action (*r*); and her sole undertaking as to damages when she applies for an interlocutory injunction is sufficient (*s*). But

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(*i*) Ord. XVI. r. 8; *Kingsman* v. *Kingsman*, 6 Q. B. D. 122; 50 L. J. Q. B. 81.

(*k*) 45 & 46 Vict. c. 75, s. 1, sub-s. 2. See *Re Outwin's Trusts* 48 L. T. 410.

(*l*) Sect. 18. See remarks of North, J., in *Re Harkness and Allsopp's Contract*, [1896] 2 Ch., at p. 363; 65 L. J. Ch. 726.

(*m*) See Rule 5 of the Practice Master's Rules.

(*n*) *Severance* v. *Civil Service Co-operative Supply Association*, 48 L. T. 485.

(*o*) *James* v. *Barraud*, 49 L. T. 300 (trespass); *Weldon* v. *Winslow*, 13 Q. B. D. 784; 53 L. J. Q. B. 528 (trespass); *Weldon* v. *De Bathe*, 14 Q. B. D. 339; 54 L. J. Q. B. 113 (trespass); *Lowe* v. *Fox*, 15 Q. B. D. 667; 54 L. J. Q. B. 561; (assault).

(*p*) *Threlfall* v. *Wilson*, 8 P. D. 18.

(*q*) *Re Prynne*, 53 L. T. 465.

(*r*) *Re Isaac, Jacob* v. *Isaac*, 30 Ch. D. 418; 54 L. J. Ch. 1136.

(*s*) *Pike* v. *Cave*, 62 L. J. Ch. 937.

where she chooses to sue by a next friend who is a person of no substance, she will be required to give security for costs (*t*); and if she sue by next friend, and the action is dismissed, she cannot bring another action against the same defendant by another next friend until the costs of the first action have been paid (*u*); and where she has no separate estate, except such as she is restrained from anticipating, and she enters an appeal without a next friend, she must give security for the costs of the appeal (*x*); or where she has no separate property at all, and appeals without a next friend (*y*). But the order for security is one altogether in the discretion of the Court (*z*). It would seem that where she appeals against an order for attachment such order for security will not be made (*a*). No special case in any cause or matter to which a married woman is a party (not being a party thereto in respect of her separate property or of any separate right of action by or against her) shall be set down for argument without the leave of the Court of a judge (*b*).

A married woman will be allowed, under proper circumstances, to sue alone (*c*) as a poor person, but where she appeals as a poor person (*d*) in an action other than against her husband, her husband as well as she must make the affidavit as to lack of means (*e*).

Her personal incapacity to act as a next friend to an infant has not been removed (*f*).

The effect of the presumption that a contract made by a married woman has been made in respect of her separate estate (*g*) is strongly in favour of the married woman when dealing with moneys or other property; thus, where she opens an ordinary banking account in her name, the contract is *prima facie* between the banker and herself, and the rights depending on the contract are vested in her (*h*).

(*t*) *Re Thompson, Stevens* v. *Thompson*, 38 Ch. D. 317; 57 L. J. Ch. 748.
(*u*) *Re Randle, Randle* v. *Payne*, 23 Ch. D. 288; 52 L. J. Ch. 544.
(*x*) *Whittaker* v. *Kershaw*, 44 Ch. D. 296.
(*y*) *Weldon* v. *Scattergood*, [1887] W. N. 69.
(*z*) *Hood Barrs* v. *Heriot*, [1896] 2 Q. B. 375.
(*a*) *Ibid.*
(*b*) R. S. C. 1883, Ord. XXXIV. r. 4.
(*c*) *Hind* v. *Whitmore*, 2 K. & J. 458.
(*d*) *Re Foster*, 18 Beav. 525.
(*e*) *Re Roberts, Kiff* v. *Roberts*, 33 Ch. D. 265.
(*f*) *Re Duke of Somerset, Thynne* v. *St. Maur*, 34 Ch. D. 465; 56 L. J. Ch. 733.
(*g*) Sect. 1, sub-s. 3; 56 & 57 Vict. c. 63, s. 1.
(*h*) Sects. 6 and 7, overruling in effect *Lloyd* v. *Pughe*, L. R. 8 Ch. App. 88; 42 L. J. Ch. 282.

Statutes of Limitations.—A married woman is now subject to the provisions of the Statutes of Limitations, and must bring her action on any contract within the limit of six years from the date of its inception; and for any trespass, false imprisonment, assault or battery, within four years of the time when the right of action accrued; for the Married Women's Property Act, 1882, has made her "discovert" for the purpose of bringing actions within the meaning of 21 Jac. I. c. 16 (*i*) within six years (*k*).

Liability for Costs.—If a married woman brings an action unsuccessfully, her free separate property is liable to satisfy the costs of the opposite party (*l*); but her separate estate, subject to the restraint against anticipation, is not available for this purpose (*m*). The costs of an unsuccessful action begun by a married woman suing by her next friend before the Act of 1882 came into force could only be raised out of such free separate property as she possessed at the time of bringing the action (*n*). Where a married woman has had judgment in an action given against her with costs, with execution limited to her separate estate, and while the judgment remains unsatisfied, the plaintiff in the same matter makes an unsuccessful application which is dismissed with costs, the plaintiff is entitled to set off against the costs he is ordered to pay the unpaid costs of his successful action (*o*).

Under Married Women's Property Act, 1893.—A considerable alteration in respect of her liability for costs has been made by the Married Women's Property Act, 1893 (*p*); for where either by herself or by next friend she commences an action or proceeding and is condemned in costs, the Court before which such action or proceeding is pending may from time to time order payment of the costs of the opposite party out of her property *which is subject to a restraint upon anticipation*. This provision has, however, been held not to apply to an appeal instituted by her (*q*), nor to proceedings in which she is a

(*i*) *Lowe* v. *Fox*, 15 Q. B. D. 667; 54 L. J. Q. B. 561.
(*k*) *Weldon* v. *Neal*, 15 Q. B. D. 471; 54 L. J. Q. B. 399.
(*l*) Sect. 1, sub-s. 2; *Galmoye* v. *Cowan*, 58 L. J. Ch. 769.
(*m*) *Cox* v. *Bennett*, [1891] 1 C. D. 617; 60 L. J. Ch. 651; *Re Andrews, Edwards* v. *Dewar*, 30 Ch. D. 159; 54 L. J. Ch. 1049, to the contrary is overruled; but its principle is established by 56 & 57 Vict. c. 63, s. 2.
(*n*) *Re Glanvill, Ellis* v. *Johnson*, 31 Ch. D. 532; 55 L. J. Ch. 325. But the principle of this case can have little or no effect at the present time. See *Neville* v. *Baker*, 4 Times Rep. 674; *Cox* v. *Bennett* (*ubi sup.*).
(*o*) *Pelton* (*Bros.*) v. *Harrison*, No. 2, [1892] 1 Q. B. 118; 61 L. J. Q. B. 144.
(*p*) 56 & 57 Vict. c. 63, s. 2.
(*q*) *Hood Barrs* v. *Cathcart*, [1894] 3 Ch. 376; 63 L. J. Ch. 793.

defendant; though her act has been the cause of their institution, such as the entry by her of a *caveat* against the grant of probate of a will (*r*); nor does it give the Court jurisdiction to alter the effect of an order made before the Act came into operation (*s*). But it does apply to a counterclaim set up by her in an action against her (*t*), and to a claim to goods seized in execution by a judgment creditor, whereby interpleader proceedings are commenced (*u*).

Actions Between Husband and Wife.—The Married Women's Property Act, 1882, gives a wife the power to sue her husband generally in respect of her property (*x*); and where she dies her personal representatives can carry on the action (*y*). This power or capacity of the wife to sue her husband in contract in respect of her separate estate is not new law, and has been long recognized by the Courts of equity (*z*). The right of the husband to sue the wife in respect of her separate property, as regards post-nuptial liabilities is recognized (*a*), but not as regards ante-nuptial obligations (*b*). Such action on his part is an admission that the property in question is her separate estate (*c*). The right to sue the husband in tort (though limited to the protection and security of her own separate property) is a novel provision (*d*). The wife is enabled to sue her husband in respect of the detention by him of her chattels (*e*), and need not add the trustees of the marriage settlement as co-plaintiffs with her (*f*). The husband has not the same right against his wife in respect of property, except by way of summary proceedings under the Married Women's Property Act, 1882, s. 17. Neither a husband nor wife can sue the other in tort. The husband cannot restrain the wife from pledging his credit, this being held to be an action of tort (*g*). The wife cannot sue for assault (*h*), or for false imprisonment (*i*), and neither can sue

(*r*) *Moran* v. *Place*, [1896] P. 214; 65 L. J. P. 83.
(*s*) *Re Lumley, Ex parte Hood Barrs*, [1894] 3 Ch. 135; 63 L. J. Ch. 897.
(*t*) *Hood Barrs* v. *Cathcart*, [1895] 1 Q. B. 873; 64 L. J. Q. B. 520.
(*u*) *Nunn* v. *Tyson, Tyson claimant*, [1901] 2 K. B. 487; 70 L. J. K. B. 854.
(*x*) Sect. 12.
(*y*) *Hale* v. *Sheldrake*, 61 L. T. 292
(*z*) *Woodward* v. *Woodward*, 8 L. T. 749.
(*a*) *Ainslie* v. *Medlicott*, 13 Ves. 269; *Earl* v. *Ferris*, 19 Beav. 67; 24 L. J. Ch. 20; *Butler* v. *Butler*, 16 Q. B. D. 374; 55 L. J. Q. B. 55.
(*b*) *Butler* v. *Butler* (*ubi sup.*).
(*c*) *Earl* v. *Ferris* (*ubi sup.*).
(*d*) Sect. 12.
(*e*) *Larner* v. *Larner*, [1905] 2 K. B. 539; 74 L. J. K. B. 797.
(*f*) *Healey* v. *Healey*, [1915] 1 K. B. 938; 84 L. J. K. B. 1454.
(*g*) *Webster* v. *Webster*, [1916] 1 K. B. 714; 85 L. J. K. B. 691.
(*h*) *Phillips* v. *Barnett*, 1 Q. B. D. 436; 45 L. J. Q. B. 277.
(*i*) *Tinkler* v. *Tinkler*, 25 T. L. R. 264.

the other for slander (*k*). Nor can a wife bring an action of deceit, though she may succeed in obtaining rescission of a deed of separation on the ground of fraud (*l*). A husband may obtain an injunction to prevent his wife, while occupying a house he wishes to sell, from interfering with inspection by intending purchasers (*m*). The wife will no longer be obliged to sue the husband together with her next friend; and she may proceed against him either by ordinary action (*n*), or summarily (*o*), before a judge of the High Court, or of the County Court, as to the title to property (*p*). Where she is living apart from her husband, and has instituted proceedings for divorce against him, she can restrain him by injunction from entering into her house, which forms part of her separate property (*q*), and he may be restrained from interfering with a business which is her separate property (*r*); but he will not be restrained from entering in the exercise of his marital rights upon premises belonging to his wife (*s*), though he may lose the right by conduct which would disentitle him to an order for restitution of conjugal rights (*t*).

Section 2.

Actions against Husband and Wife.

Joint Actions.—The principles now regulating the bringing of joint suits against husband and wife are much the same as those regulating the commencement of joint actions by them. The husband will never be joined for mere form; his joinder as defendant is a matter of substance.

In Contract.—Formerly, a husband and wife must have been sued jointly in contract in two cases: (a) on contracts made by the wife before marriage; (b) on contracts in which a claim is made against her as executrix or administratrix (*u*). As regards the latter case, the law is definitely altered by the Married Women's Property Act, 1882, for she may now as executrix or

(*k*) *Young* v. *Young*, [1903] 5 F. Ct. of Sess. 330.
(*l*) *Hulton* v. *Hulton*, [1917] 1 K. B. 813; 86 L. J. K. B. 633.
(*m*) *Hill* v. *Hill*, [1916] W. N. 59.
(*n*) Sect. 12.
(*o*) Sect. 17.
(*p*) *Humphery* v. *Humphery*, [1917] 2 K. B. 72; 86 L. J. K. B. 775.
(*q*) *Symonds* v. *Hallett*, 24 Ch. D. 346; 53 L. J. Ch. 60.
(*r*) *Wood* v. *Wood*, 19 W. R. 1049.
(*s*) *Gaynor* v. *Gaynor*, [1901] 1 Ir. R. 217.
(*t*) *Shipman* v. *Shipman*, [1924] 2 Ch. 140; 93 L. J. Ch. 382.
(*u*) Dicey, Part. 297.

administratrix or trustee be sued alone without her husband (*x*). As regards the first case the husband is still liable to be sued jointly with his wife, also for her ante-nuptial debts. If he was married before August 9, 1870 (*y*), he is at common law liable for her ante-nuptial contracts and debts. If he was married between that date and July 30, 1874 (*z*), he is not liable at all for her ante-nuptial debts, but only for contracts and torts; but after the latter date he is liable to the extent of certain assets received by him in right of his wife for her ante-nuptial debts, contracts and torts (*a*); and since January 1, 1883 (*b*), in respect of her assets received by him generally on marriage (*c*). Creditors proceeding under the sections rendering the husband liable must be careful in exercising their discretion as to joining him or not, and the onus of proof that he has received assets of his wife will be cast upon them (*d*), and if they fail in their proof, they will be visited with the payment of his costs (*e*). A husband is entitled to defend separately whether by reason of his having a separate ground of defence, or his wife refusing or being unable or neglecting to put in a defence. A married woman sued jointly may defend separately without giving security for costs, and without applying for leave to do so (*f*). Where the husband is properly joined in an action against his wife for her ante-nuptial liabilities, but is successful in his defence, the amount of his costs can be added to the wife's debt, and be recovered out of her separate property (*g*).

In joint suits against husband and wife, their separate entity is now largely recognized; for when both are defendants to an action they must both be served with the writ unless the Court or a judge shall order otherwise (*h*); and in a case where husband and wife were joint defendants, and the former could not be found, he was ordered to be served by advertisement (*i*). If the subject-matter of the action arises in right of the wife, and the husband is out of the jurisdiction, an order may be made for

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(*x*) Sect. 18.
(*y*) Date of the passing of the Married Women's Property Act, 1870.
(*z*) Date of the passing of the Married Women's Property (Amendment) Act, 1874.
(*a*) See *ante*, chap. x.
(*b*) Date of the operation of the Married Women's Property Act, 1882.
(*c*) Sects. 14 and 15.
(*d*) See *Matthews* v. *Whittle*, 13 Ch. D. 811; 49 L. J. Ch. 359.
(*e*) *London and Provincial Bank* v. *Bogle*, 7 Ch. D. 773; 47 L. J. Ch. 301.
(*f*) Effect of section 1 (2) of 45 & 46 Vict. c. 75.
(*g*) *Ibid.*
(*h*) R. S. C. 1883, Ord. ix., rr. 2, 3.
(*i*) *Whitley* v. *Honeywell*, 35 L. T 517.

service on her alone, and the action may proceed against her separately (*k*).

In Tort.—In actions founded in tort, as in those founded on contract, the husband will not in the future be joined for mere form's sake, but as a matter of substance. In actions founded on the tort of his wife, he will be joined only where it is the joint tort of himself and his wife (*l*).

Joint and Several Claims.—Claims against husband and wife may now be joined with claims against either of them separately (*m*). Where husband and wife are made defendants to an action relating to personal property belonging to the wife, and they put in a joint defence, such defence may be read against them for the purpose of fixing them with the admissions contained in it. But where the action relates to the inheritance of the wife, it cannot be so read; and the facts relied upon must be proved against them by other evidence (*n*). A wife cannot be compelled to make discovery which may expose her husband to a charge of felony (*o*); nor can she be made a party to an action for the mere purpose of obtaining discovery from her to be used against her husband (*p*).

Wife Infant.—Where a married woman is an infant she must defend by her guardian *ad litem*, and it is the usual practice to appoint the husband as her guardian when he is a co-defendant and they intend to defend jointly (*q*). One judgment only is to be recorded against them; and where the husband was sued merely as husband it was not open for the husband in an action for libel by his wife to pay money into Court and for the wife to deny liability (*r*).

Joint Judgment.—A joint judgment obtained against the husband and wife will now be a judgment against the husband personally to the extent of his liability, and against the wife as to her separate property; and as to the residue of the debt or liability, the judgment will be a separate judgment against the wife as to her separate property (*s*). The separate existence of husband and wife is so clearly recognized that if a party suing

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(*k*) Dan. Ch. Pr.
(*l*) *Vine* v. *Saunders*, 4 Bing. N. C. 96.
(*m*) R. S. C. 1883, Ord. XVIII. r. 4.
(*n*) Dan. Ch. Pr.
(*o*) *Cartwright* v. *Green*, 8 Ves. 405.
(*p*) *Le Texier* v. *Margrave of Anspach*, 5 Ves. 322; Dan. Ch. Pr.
(*q*) *Colman* v. *Northcote*, 7 Jur. 528.
(*r*) *Beaumont* v. *Kay*, [1904] 1 K. B. 292; 73 L. J. K. B. 213.
(*s*) 45 & 46 Vict. c. 75, s. 15.

them jointly obtain a judgment against the husband whether it is satisfied or not, the wife is entitled to the benefit of the rule that a judgment recovered against one of two joint contractors is a bar to an action against the other (*t*). A judgment against husband *or* wife in the alternative cannot be brought in respect of necessaries ordered by the wife simply on the ground of co-habitation, and Order xiv. r. 5, of the rules of the Supreme Court does not enable such action to be sustained (*u*). If a creditor elects to sue an agent, and is unsuccessful, he cannot afterwards proceed against the principal for the same debt. But if a creditor sues husband and wife jointly, though there is no real joint liability, and obtains judgments against the wife for part of the debt, he is not precluded from proceeding against the husband for the balance (*x*), there having been no election as to the balance.

Action against Husband Alone on Contracts Made by the Wife.—Wherever the cause of action brought against the husband arises from some act or representation on his part by which he directly or by implication of law makes himself liable on the contract made by his wife, then the husband may be sued alone, as where he requests money to be lent to his wife (*y*), or for necessaries supplied to her under conditions which render him liable for their supply (*z*). But if the contract has been entered into by her in respect of her separate estate, he cannot be sued alone in regard to it.

Husband may be Sued Alone in Respect of his Wife's Ante-nuptial Contracts and Debts.—The husband may be sued *alone* for his wife's ante-nuptial contracts and debts; but before he can be rendered liable in respect of them, it must be proved that he has received assets through his wife (*a*). This provision renders him liable to be sued alone not only during coverture but after it has terminated, by death or divorce, and, in this latter respect, has broken in upon the old common law doctrine that he thereupon became free from liability for his wife's ante-nuptial engagements, even though he had received assets (*b*). His liability, however, will extend only to the

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(*t*) *Hoare* v. *Niblett*, [1891] 1 Q. B. 781; 60 L. J. Q. B. 565.

(*u*) *Morel* v. *Westmorland (Earl of) and Wife*, [1904] A. C. 11; 73 L. J. K. B. 93.

(*x*) *French* v. *Howie and Wife*, [1905] 2 K. B. 580; 75 L. J. K. B. 853.

(*y*) *Stephenson* v. *Hardy*, 3 Wils. 388.

(*z*) See *ante*, pp. 290 *et seq.*

(*a*) 45 & 46 Vict. c. 75, s. 14.

(*b*) See *Heard* v. *Stamford*, 3 P. Wms. 409; *Bell* v. *Stocker*, 10 Q. B. D. 129; 52 L. J. Q. B. 49. This last case decided that the Married Women's Property

amount of the assets received by him through his wife; and if he has not received any assets at all in her right, he will be entitled to judgment and costs (*c*). His liability for such ante-nuptial debts of his wife will cease after six years from the time when they were incurred (*d*). The wife is not a necessary party to an action seeking to charge her husband's interest in her real estate (*e*).

Actions against Wife Alone.—A married woman formerly could not be sued alone except under the same circumstances as those in which she could sue alone (*f*), but her husband was a necessary party. Where she was sued in respect of her separate estate he must have been joined (*g*); so, too, where she was sued on her ante-nuptial liabilities. Under the Married Women's Property Act, 1870, it was at first held that she could not be sued alone in respect of her separate earnings, but in such action her husband had to be joined as a defendant (*h*); but in a later case she was held liable to be sued alone in respect of her ante-nuptial liabilities (*i*); and under the like Act of 1882 she may in all respects be sued, both in contract and in tort, as a single woman, and her husband need not be made a party in the action (*k*), and she may be solely sued by her husband (*l*). This liability of a married woman to be sued alone for her ante-nuptial debts and liabilities is expressly confirmed by this last Act (*m*), and is not curtailed by her settling her own property on herself on marriage, with a restraint upon anticipation (*n*). But property not settled by herself and subject to the restraint cannot be touched for her ante-nuptial engagements (*o*).

Married Women's Property Act, 1882, Retrospective as to Procedure.—In the matter of procedure the Act of 1882 is retrospective; consequently a woman married before that Act

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Act, 1874, did not deprive the husband of his common law protection against the claims of his wife's ante-nuptial creditors after her death, though he had received assets in her right.

(*c*) Sect. 15.
(*d*) *Beck* v. *Pierce*, 23 Q. B. D. 316; 58 L. J. Q. B. 516.
(*e*) *Waugh* v. *Wren*, 11 W. R. 244.
(*f*) Dan. Ch. Pr. 185, see *ante*, p. 401.
(*g*) *Hancocks* v. *Lablache*, 3 C. P. D. 197; 47 L. J. C. P. 514.
(*h*) *Ibid.*
(*i*) *Mercier* v. *Williams*, 9 Q. B. D. 337; 10 A. C. 1; 51 L. J. Q. B. 594.
(*k*) Sect. 1, sub-s. 2.
(*l*) *Butler* v. *Butler*, 16 Q. B. D. 374; 55 L. J. Q. B. 55.
(*m*) Sect. 13.
(*n*) Sect. 19.
(*o*) *Birmingham Excelsior Money Society* v. *Lane*, [1904] 1 K. B. 35; 73 L. J. K. B. 28.

came into force is liable to be sued alone in respect of a contract made by her before it came into operation (*p*). As an executrix or trustee she may be sued with or without her husband in respect of any property held by her in a representative capacity (*q*).

Where a married woman pays money into Court as the price of getting leave to defend, she cannot, if the plaintiff recovers, be heard to say that the money so paid in is not available to satisfy the judgment (*r*).

What Property Liable to Satisfy Judgment.—As the liability of a married woman is proprietary and not personal (*s*), a judgment against her can only be executed on her free separate property, that is, property which she is not improperly restrained from anticipating (*t*). The various stages of her proprietary liability are as follows: Under the principles of equity the free separate property she possessed at the date of incurring her liability (*u*); under the Married Women's Property Act, 1870, her separate property which she possessed at the time of incurring her liability, whether free or subject to the restraint against anticipation (*x*); under the Married Women's Property Acts, 1882 and 1893, free separate property possessed by her at the time of incurring her liability and subsequently acquired free separate property, such property being deemed to be "free" if subject to the restraint against anticipation imposed by herself in such a way as to withdraw it improperly from the claims of her creditors (*y*). There is an exception under the Act of 1893 to the effect that costs of an unsuccessful action or proceeding instituted by her may be raised out of her property though subject to such restraint (*z*). Property which a married woman becomes possessed of or entitled to while discovert is now liable to satisfy claims against her (*a*). Property on the termination of the coverture ceases, it is true, to be separate

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(*p*) *Gloucestershire Banking Co.* v. *Phillips* (*Creagh, Third Party*), 12 Q. B. D. 533; *Bursill* v. *Tanner*, 13 Q. B. D. 691.

(*q*) Married Women's Property Act, 1882, s. 18; and see per North, J., in *Re Harkness and Allsopp's Contract*, [1896] 2 Ch. 363; 65 L. J. Ch. 726.

(*r*) *Bird* v. *Barstow*, [1892] 1 Q. B. 94; 61 L. J. Q. B. 1.

(*s*) *Scott* v. *Morley*, 20 Q. B. D. 120; 57 L. J. Q. B. 43.

(*t*) *Ibid.*

(*u*) *Johnson* v. *Gallagher*, 30 L. J. Ch. 298.

(*x*) *London and Provincial Bank* v. *Bogle*, 7 Ch. D. 773; 47 L. J. Ch. 301; *Axford* v. *Reid*, 22 Q. B. D. 548; 58 L. J. Q. B. 230.

(*y*) *Scott* v. *Morley* (*ubi sup.*).

(*z*) Sect. 2. For what is and what is not an "institution" of an action or proceeding by a married woman, rendering her restrained separate property liable or not liable, see *ante*, p. 404.

(*a*) 56 & 57 Vict. c. 63, s. 1 (c).

estate; but if it has been subject to the fetter of restraint, her creditor cannot avail himself of the cesser of the restraint (*b*).

Free Separate Property.—Unconditional judgment cannot be signed against a married woman under Order XIV. r. 1 (*c*); and execution can only issue against her separate estate free from restraint against anticipation (*d*). Judgment may be signed against her (a) *in default of appearance*, although the indorsement of the writ does not contain an allegation that she was possessed of separate property at the time the liability was contracted; but the judgment must be limited as directed in *Scott* v. *Morley* (*e*); (b) *in default of defence*; in such a case the statement of claim, whether specially indorsed or not, must contain an allegation that the married woman had separate property at the date of the contract in respect of which the action was brought (*f*); and if it does not contain such allegation, it must be amended or an affidavit filed that she did possess separate property. The above rules apply to contracts governed by the Married Women's Property Act, 1882, but as under the Married Women's Property Act, 1893, section 1 (a) the possession of separate property, whether free or restrained, is not now a condition precedent to a valid contract by a married woman, it will not be necessary to allege that she possessed separate property at the date of the contract; but as the later Act preserves the effect of the restraint, execution will be limited to what is her free separate property (*g*).

Statute of Limitations.—Claims against a married woman will now be barred unless brought within the time limited by the Statute of Limitations (*h*)

Form of Judgment.—The following forms of judgment against a married woman have been settled. Under the Married Women's Property Act, 1870: "It is adjudged that the plaintiff do recover the sum of £ . and costs to be taxed against the defendant (the married woman), such sum and costs to be payable out of her separate property, whether subject to any restriction against anticipation or not, and not otherwise" (*i*).

(*b*) *Barnett* v. *Howard*, [1900] 2 Q. B. 784; 69 L. J. Q. B. 955; *Softlaw* v. *Welch*, [1899] 2 Q. B. 419; 68 L. J. Q. B. 940; *Brown* v. *Dimbleby*, [1904] 1 K. B. 28; 73 L. J. K. B. 35.

(*c*) *Bursill* v. *Tanner*, 13 Q. B. D. 691; *Perks* v. *Mylrea*, [1884] W. N. 64; L. Jo. Mar. 8, 1884.

(*d*) *Perks* v. *Mylrea*, *Ibid.*; *Beckett* v. *Tasker*, 19 Q. B. D. 7.

(*e*) 20 Q. B. 120.

(*f*) See *Tetley* v. *Griffith*, 57 L. T. 673.

(*g*) Sect. 1, proviso.

(*h*) *Re Hastings*, *Hallett* v. *Hastings*, 35 Ch. D. 94; 56 L. J. Ch. 631.

(*i*) *Axford* v. *Reid*, 22 Q. B. D., at p. 553; 58 L. J. Q. B. 230.

Under the Married Women's Property Act, 1882: "It is adjudged that the plaintiff do recover £ and costs (to be taxed) against the defendant (the married woman), such sum and costs to be payable out of her separate property, as hereinafter mentioned, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant (the married woman) not subject to any restriction against anticipation, unless by reason of the Married Women's Property Act, 1882, the property shall be liable to execution, notwithstanding such restriction" (*k*). This is still the proper form of judgment to be used in an action against a widow upon a contract entered into by her during coverture after the passing of the Married Women's Property Act, 1882, and before the passing of the Married Women's Property Act, 1893 (*l*). The only difference in the case of ante-nuptial and post-nuptial liabilities is, that in the former there is no need on the part of the plaintiff to prove that the defendant possessed property at the time of their being incurred (*m*). It was not necessary, under the Married Women's Property Act, 1882, for the plaintiff to prove the existence of free separate property at the date of the judgment (*n*), and certainly cannot be so since the passing of the Married Women's Property Act, 1893. Where the judgment has been drawn up in the ordinary form of a personal judgment, instead of the appropriate form as against a married woman, the Court will not allow an amendment as in the case of an accidental slip, as the effect would be to substitute one form of judgment for another (*o*).

How Judgment Enforced.—Judgment obtained against a married woman may be enforced against her free separate property by legal execution, as by *fi. fa.*, or *elegit* in the case of her realty; and by equitable execution where legal execution cannot reach the *corpus* of the property upon which the order is to operate, through the existence of some legal impediment, as by the appointment of a receiver (*p*). An inquiry may be directed

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(*k*) *Scott* v. *Morley*, 20 Q. B. D. 120; 57 L. J. Q. B. 43; *Downe* v. *Fletcher*, 21 Q. B. D. 11.

(*l*) *Softlaw* v. *Welch*, [1899] 2 Q. B. 419; 68 L. J. Q. B. 940.

(*m*) See *Downe* v. *Fletcher* (*ubi sup.*).

(*n*) *Ibid.*

(*o*) *Oxley and others* v. *Link*, [1914] 2 K. B. 734; 83 L. J. K. B. 602.

(*p*) *Bryant* v. *Bull*, 10 Ch. D. 153; 48 L. J. Ch. 325; *Fuggle* v. *Bland*, 11 Q. B. D. 711; *Re Peace and Waller*, 24 Ch. D. 405; *Cummins* v. *Perkins*, [1899] 1 Ch. 16; 68 L. J. Ch. 57 This was a case in which a married woman suing in respect of her separate estate was condemned in costs, which were ordered to be paid out of her separate property and not otherwise.

as to the existence of free separate property of a married woman who is a judgment debtor, and an order may be made for the attendance and examination of the judgment creditor (but not of any other person (*q*)), or for the production of books and documents (*r*). The judgment can be enforced against arrears of income, though subject to the restraint, which have not actually come into her hands if they have become payable to her before the judgment (*s*); but not against arrears which have become due after the date of the judgment (*t*); and a creditor who has obtained leave to sign final judgment cannot, by delay in signing, even with leave of the Court, get by the appointment of a receiver at her income which was not actually in arrear at the time of obtaining leave to enter judgment (*u*).

The receiver does not interfere with the possession of the property by the trustees, but receives from them whatever they would otherwise have paid to the married woman; and the rights of the trustees over the property remain unaffected (*x*). The receiver may be appointed by an order obtained in a suit brought to charge the woman's separate estate; but he may also be appointed by an order without any fresh suit, where proceedings are already pending (*y*); also where her property has had an order made against it removing the restraint upon anticipation for the purpose of satisfying the costs of a proceeding unsuccessfully instituted by her within the meaning of section 2 of 56 & 57 Vict. c. 63 (*z*). Judgment may also be enforced by sequestration (*a*), and a garnishee order (*b*). It is not an absolute condition precedent to obtaining a sequestration order that the judgment creditor should allege the existence of property on which the sequestration could take effect; it is for the judgment debtor to show that the issuing of the order would be a futile proceeding (*c*). She may also be committed under the

(*q*) *Hood Barrs* v. *Heriot*, Exp. Blyth, [1896] 2 Q. B. 338; 65 L. J. Q. B. 622.
(*r*) *Countess of Aylesford* v. *G. W. Ry. Co.*, [1892] 2 Q. B. 626; *Sturges* v. *Countess of Warwick*, 30 T. L. R. 112.
(*s*) *Hood Barrs* v. *Heriot*, [1896] A. C. 174; 65 L. J. Q. B. 352, overruling the reasoning in *Hood Barrs* v. *Cathcart*, [1894] 2 Q. B. 559; 63 L. J. Q. B. 602, on this point.
(*t*) *Hood Barrs* v. *Cathcart* (*ubi sup.*); *Whiteley* v. *Edwards*, [1896] 2 Q. B. 48; 65 L. J. Q. B. 457. See *ante*, p. 368.
(*u*) *Colyer* v. *Isaacs*, 77 L. T. 198.
(*x*) *Re Peace and Waller* (*ubi sup.*).
(*y*) *Ibid.*
(*z*) *Hood Barrs* v. *Cathcart*, [1895] 1 Q. B. 873; 64 L. J. Q. B. 520.
(*a*) *Miller* v. *Miller*, L. R. 2 P. & M. 54; *Hyde* v. *Hyde*, 13 P. D. 166; 57 L. J. P. 89.
(*b*) *Holtby* v. *Hodgson*, 24 Q. B. D. 103; 59 L. J. Q. B. 46.
(*c*) *Hulbert* v. *Cathcart*, [1896] A. C. 470; 65 L. J. Q. B. 644.

Debtors Act, 1869 (*d*), on judgments in respect of ante-nuptial debts and post-nuptial torts (*e*), on the ground that where she was primarily liable to be taken under a writ of *capias ad satisfaciendum*, she can now be summoned under section 5 of the Debtors Act, 1869, and dealt with accordingly.

Judgment, on the other hand, cannot be enforced against her by committal under section 5 of the Debtors Act, 1869, for her post-nuptial debts (*f*), or by being made the ground for issuing a bankruptcy notice under section 1, sub-section 1 (g) of the Bankruptcy Act, 1914, unless she carries on a trade. If she is imprisoned for non-compliance with an order to pay costs, she is entitled to her writ of *habeas corpus* (*g*). But obedience to an order of the Court to pay in money by her in the capacity of a trustee or administratrix may be enforced by attachment under section 4 of the Debtors Act, 1869 (*h*).

Joinder of Trustees.—Where the property of a married woman is in trust, and her creditors seek no more than to obtain a charge upon it, her trustees are not necessary parties to the suit (*i*); but where they seek to obtain payment out of the separate property vested in trustees, they must make the latter joint defendants with the married woman (*k*). An order cannot be made against the trustees unless they are present before the Court, but an order may be made declaring the demand of the woman's creditor payable out of the separate estate. This would seem to be still the law under the Married Women's Property Act, 1882.

(*d*) 32 & 33 Vict. c. 62, s. 5.

(*e*) *Scott* v. *Morley* (*ubi sup.*); *Robinson* v. *Lynes*, [1894] 2 Q. B. 577; 63 L. J. Q. B. 759.

(*f*) *Meager* v. *Pellew*, 14 Q. B. D. 973; *Draycott* v. *Harrison*, 17 Q. B. D. 147; *Scott* v. *Morley* (*ubi sup.*).

(*g*) *Re Walter*, 55 J. P. 551; 7 Times Rep. 445.

(*h*) *Re Turnbull*; *Turnbull* v. *Nicholas*, [1900] 1 Ch. 180; 69 L. J. Ch. 187. It does not appear that the *semble* in this case is based on a correct apprehension of the decision in *Scott* v. *Morley* (*ubi sup.*).

(*i*) *Picard* v. *Hine*, L. R. 5 Ch. App. 274; *Collett* v. *Dickenson*, 11 Ch. D. 687; *Davies* v. *Jenkins*, 6 Ch. D. 728; 46 L. J. Ch. 761; *Flower* v. *Buller*, 15 Ch. D. 665; 49 L. J. Ch. 784; *Re Peace and Waller*, 24 Ch. D. 405.

(*k*) *Collett* v. *Dickenson* (*ubi sup.*).

CHAPTER XV.

SEPARATION AND DIVORCE.

There are three methods of putting an end to or suspending the relation of husband and wife: (1) by agreement for separation; (2) by divorce *a vinculo matrimonii*, or dissolution of marriage; (3) by judicial separation. The first is effected by mutual and voluntary arrangement between the parties and their friends, the second and third can only be obtained by judicial intervention. To avoid recriminations, and unpleasant, not to say scandalous exposures in open Court, and more effectually provide for their altered circumstances, the parties execute deeds of arrangement, which are called "separation deeds."

Section 1.

Separation Deeds.

In Equity.—At one time the Courts of equity were reluctant in any way to recognize the validity of these arrangements, and where they were in the form of articles of separation, refused to carry them into effect (*a*). The ground of this attitude of the Courts towards these arrangements was that the marriage tie was indissoluble, and could not be broken except by the supreme force of the Legislature, or suspended by the sentence of a competent ecclesiastical Court pronounced *pro salute animæ* of the offending party; and that it was *contra bonos mores*, that is, against public policy, to allow them. Indeed, in more than one case it was seriously doubted whether this separation *in pais* of husband and wife was valid and ought to be enforced (*b*). In time, however, the Courts of equity recognized that such deeds, when not contemplating a future separation, were valid so far as related to the trusts and covenants by which the husband made a provision for the wife, and the indemnity given to the

(*a*) *Worrall* v. *Jacob*, 3 Mer. 256.
(*b*) See *St. John* v. *St. John*, 11 Ves. 526; *Westmeath* v. *Westmeath*, 1 Dow, H. L. (N.S.) 519. See *Smythe* v. *Smythe*, 18 Q. B. D. 544; 56 L. J. Q. B. 217.

husband by the trustee (*c*). The theory of a deed of separation is that it is a contract between the husband and wife through the intervention of a third party, namely, the trustee; and the husband's contract for the benefit of the wife is supported by the contract of the trustee on her behalf (*d*). As will be seen lower down, the more modern opinion is that husband and wife can enter into a deed of separation without the intervention of a trustee (*f*).

At Common Law.—In early times the common law Courts gave effect to a deed of separation, and held that it was a good answer to a husband seeking by *habeas corpus* to obtain the person of his wife (*g*). The Court of King's Bench, in *Rodney* v. *Chambers* (*h*), held that covenants by the husband with the wife's trustees to allow her a sum of money on their mutual separation could be enforced, and that the husband's liability in such a matter was too inveterate and well settled to be disturbed. In this case it was also held that the husband's covenant could be enforced even in the case of a future separation, provided that it took place with the consent and approbation of the trustees. The way the Courts enforced these deeds was by giving effect to the minor and auxiliary part of the agreement, such as the covenant of the husband to pay an annuity, or the covenant of the trustees to indemnify the husband; but the principal and essential motive, the actual separation, they did not enforce (*i*).

The mere arrangement for separation was not recognized by the ecclesiastical Courts, and formed no bar to a suit for the restitution of conjugal rights (*k*).

In time, however, a conviction that to settle unhappy differences and quarrels in the domestic forum of friends and relatives was really less shocking than parading them in open Court, brought about a change in the attitude of the Courts towards these private arrangements, and a series of decisions recognizing their validity has long since placed their legality on a secure basis and footing, unless the deed is founded on a consideration clearly illegal, such as an agreement to facilitate divorce pro-

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(*c*) *St. John* v. *St. John* (*ubi sup.*); see Lord Eldon's remarks in that case, p. 537.
(*d*) Per Lord Westbury in *Hunt* v. *Hunt*, 4 De G. F. & J. 221, 239; 31 L. J. Ch. 161.
(*f*) *Sweet* v. *Sweet*, [1895] 1 Q. B. 12; 64 L. J. Q. B. 108.
(*g*) *Rex* v. *Mead*, 1 Burr. 542; *Rex* v. *Winton*, 5 T. R. 91.
(*h*) 2 East, 283.
(*i*) See *Frampton* v. *Frampton*, 4 Beav. 293.
(*k*) See *Mortimer* v. *Mortimer*, 2 Hag. Con. R. 318.

ceedings (*l*), or to enable the wife to commit adultery (*m*). The Courts will not give effect to an agreement to live apart entered into before marriage though it is confirmed afterwards (*n*), but where husband and wife while living apart executed a deed under which they agreed to resume co-habitation with a provision for the payment of a weekly sum by the husband in case of a further separation, the deed was held valid (*o*).

Separation must be Actual.—The Courts give full effect to a deed arranging for present separation with the intervention of a trustee, and the mere fact of its being voluntary and not founded on valuable consideration, does not make it less binding on the husband (*p*). It is no longer necessary to recite facts which would entitle one of the parties to a judicial separation, or a divorce *a vinculo matrimonii* (*q*).

An agreement for separation to be valid and enforceable must be followed at once by actual separation (*r*); for the Court only gives effect to the contract between the parties when their separation has become inevitable (*s*).

Fraud.—An agreement for separation is subject to the general law as to the unenforceability when the agreement is obtained by fraud or duress. Where the execution of a deed is obtained by fraudulent misrepresentation or fraudulent concealment as to the guilt of either party (*t*), or as to the means of the husband (*u*), if there is belief in the misrepresentation and the signature is induced by the fraud. Where the husband had no intention of fulfilling the terms of the agreement the wife was held not bound (*x*).

Duress.—Neither is an agreement for separation binding where duress has been brought to bear. Where the wife having no independent advice was told by her husband and his solicitor that the only way for her to obtain an allowance was by signing,

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(*l*) *Hope* v. *Hope*, 26 L. J. Ch. 417.

(*m*) *Evans* v. *Carrington*, 2 De G. F. & J. 481; 29 L. J. Ch. 330; and per Cotton, L.J., in *Fearon* v. *Earl of Aylesford*, 14 Q. B. D. 792; 54 L. J. Q. B. 33.

(*n*) *Brodie* v. *Brodie*, [1917] P. 271; 86 L. J. P. 140.

(*o*) *Re Meyrick's Settlement; Meyrick* v. *Meyrick*, [1921] 1 Ch. 111; 90 L. J. Ch. 152.

(*p*) *Frampton* v. *Frampton* (*ubi sup.*).

(*q*) Macq. H. & W. 368; *Waite* v. *Waite*, 5 Bing. N. C. 341.

(*r*) *Westmeath* v. *Salisbury*, 5 Bli. (N.S.) 339; *Bindley* v. *Mulloney* L. R. 7 Eq. 343.

(*s*) *Bateman* v. *Ross*, 1 Dow. 235; *Hunt* v. *Hunt*, 4 De G. F. & J. 221; 31 L. J. Ch. 161; *Courtney* v. *Courtney*, [1923] 2 Ir. R. 31.

(*t*) *Evans* v. *Carrington*, 2 De G. F. & J. 481; 30 L. J. Ch. 364; *Brown* v. *Brown*, L. R. 7 Eq. 185; 38 L. J. Ch. 153.

(*u*) *Hulton* v. *Hulton*, [1917] 1 K. B. 813; 86 L. J. K. B. 633.

(*x*) *Crabb* v. *Crabb*, L. R. 1 P. & D. 601; 37 L. J. P. & M. 42.

as otherwise her husband would leave her and she would get nothing, the agreement was held not binding (*y*). Threats of violence make the resulting deed unenforceable, but threats of proceedings for divorce, judicial separation or nullity are not such threats as affect the validity of the deed (*z*).

Intervention of a Trustee.—Formerly the intervention of a trustee was in all cases necessary (*a*); but now, where the wife is at arm's-length with her husband, and is proceeding against him in the Divorce Court, she may contract with him, without the intervention of a trustee, for the abandonment of the suit in consideration of an annuity to be paid by him; and from this it follows that she can enter into a valid and enforceable contract to live separate and apart from him (*b*). 'The trustee was interposed for the purpose of supplying a consideration when otherwise there would have been none. The notion was that the contract between husband and wife being *prima facie* void, the trustee was introduced in order that his covenant to indemnify the husband might afford a consideration for the husband's promise. But where there is a valid consideration between husband and wife, there is no need of a trustee" (*c*). Under the Married Women's Property Act, 1882, a married woman has full capacity, without the intervention of a trustee to contract by deed to live apart from her husband (*d*). How far a deed unsupported by what may be termed sufficient consideration would of its own force support the separation covenants, if at all, is not yet finally decided (*e*).

Husband and Wife at Arm's-length.—Where husband and wife, hopelessly at arm's-length, agree to separate and live apart, and the only consideration for their separation is their mutual covenants to allow each other to live apart, and not to molest each other, or seek for restitution of conjugal rights (but there is no covenant by trustees to indemnify the husband, and no covenant by the husband to allow his wife an annuity), such an arrangement will in all probability be recognized and enforced by the Courts, but such a covenant will not usually be held to be a bar to proceedings for restitution of conjugal rights if the

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(*y*) *Adamson* v. *Adamson*, 23 T. L. R. 434.
(*z*) *Wilson* v. *Wilson*, 1 H. L. Ca. 538; *Holroyd* v. *Holroyd*, 36 T. L. R. 479.
(*a*) *Worrall* v. *Jacob*, 3 Mer. 256.
(*b*) *Gibbs* v. *Harding*, L. R. 4 Eq. 490; 39 L. J. Ch. 374.
(*c*) Per Lindley, L.J., in *Macgregor* v. *Macgregor*, 21 Q. B. D. 431; 57 L. J. Q. B. 591.
(*d*) *Sweet* v. *Sweet*, [1895] 1 Q. B. 12; 64 L. J. Q. B. 108.
(*e*) See *Marshall* v. *Marshall*, 5 P. D. 19.

Court is satisfied as to the sincerity of the petitioner (*f*); nor is a covenant not to sue for restitution of conjugal rights a bar to a suit when the agreement is repudiated by the husband (*g*). An oral agreement between husband and wife to live separate, which was based on a compromise of cross criminal proceedings for assault, and without the intervention of a trustee, was held binding and enforceable (*h*).

Distinction between Executed and Executory Arrangements.—At one time a distinction was drawn between an executed deed arranging for a present separation and an executory arrangement, that is, articles of separation; the Courts would enforce the first, but refused to give any validity to the latter. This distinction was swept away by the House of Lords in *Wilson* v. *Wilson* (*i*), in which it was held that the Court of Chancery had power to decree specific performance of such articles, if founded on sufficient consideration, and if the parties were separated. There is, however, a distinction which still holds good between an executed and an executory arrangement for separation; thus, if in the first there is an illegal condition or provision among good and valid ones, the whole deed will not be vitiated, but only the illegal provision ignored; but if in articles of separation there is an illegal condition or provision, this will render the contract null and void, for an executory contract must be performed *in toto* or not at all (*k*); thus, where a deed had been executed, and contained certain stipulations that were good, and others that contravened the law, the latter were held not to vitiate the deed, but the Court only enforced those that were in consonance with the law (*l*).

Specific Performance of Executed Deeds.—The Court of Chancery will decree specific performance of executed deeds of separation, and will give the widest possible effect to them consistent with the interests of society. It is true that in *Marshall* v. *Rutton* (*m*) it was decided that husband and wife were unable of their own will and act, and without the sentence of a competent tribunal, to alter their legal status and capacity; but the modern view of the law is to the contrary effect, and

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(*f*) *Williams* v. *Williams*, [1921] P. 131; 90 L. J. P. 97; *Walter* v. *Walter*, [1921] P. 302; 90 L. J. P. 372.
(*g*) *Waller* v. *Waller*, 26 T. L. R. 223.
(*h*) *Macgregor* v. *Macgregor*, 21 Q. B. D. 431; 57 L. J. Q. B. 591.
(*i*) 1 H. L. Cas. 538.
(*k*) *Vansittart* v. *Vansittart*, 27 L. J. Ch. 290.
(*l*) *Ibid.*; *Hamilton* v. *Hector*, L. R. 13 Eq. 511.
(*m*) 8 T. R. 545.

now a married woman can contract for valid and sufficient reasons to live apart from her husband, and is entitled to come to the Court to enforce specific performance of such a contract (*n*). The Court will also restrain the parties from persistent breaches of the covenants in the deed; thus it would restrain a husband from molesting his wife (*o*), and a wife from instituting proceedings for restitution of conjugal rights (*p*). Compensation for breach of the covenants may be assessed at a pecuniary sum (*q*).

Covenants not Inter-dependent.—The covenants in a separation deed are independent of each other; and a breach of the covenant on the one side will not exonerate the covenantor on the other side from the due performance of his covenant; for example, breach of a covenant not to molest cannot be set up as a defence to an action for payment of an annuity under the same deed (*r*). But it would seem that where one party acted in a manner wholly inconsistent with the objects of the deed, in such a case the other party would be exonerated from liability under the deed; that is, would be entitled to treat the deed as at an end (*s*).

Molestation.—Where a wife or a trustee for her covenants that she will not "molest" her husband, mere adultery on her part, or adultery followed by the birth of a child, is not a breach of the covenant not to molest (*t*). Molestation must be some act done by the wife or on her authority with the intent to annoy her husband, and which is in fact an annoyance to him; or at least some act must be done by her or on her authority with a knowledge that it must of itself, without more, annoy her husband, or annoy a husband with reasonable and proper feeling (*u*). Therefore, if a wife give birth to a bastard child while living separate from her husband, and put forward that child as being one of her husband's, especially with intent to claim a title or property which a legitimate child of her husband would take, that conduct might be evidence of a breach of a covenant not to molest (*x*). But where there is no *dum casta* clause and the wife covenants not to "annoy" as well as "molest" her husband, adultery resulting in the birth of a

(*n*) *Wilson* v. *Wilson* (*ubi sup.*).
(*o*) *Saunders* v. *Rodway*, 22 L. J. Ch. 230.
(*p*) *Besant* v. *Wood*, 12 Ch. D. 605; 48 L. J. Ch. 497.
(*q*) *Fearon* v. *Earl of Aylesford*, 14 Q. B. D. 792; 54 L. J. Q. B. 33.
(*r*) *Ibid.* (*s*) *Ibid.* (*t*) *Ibid.*
(*u*) Per Brett, M.R., in *Fearon* v. *Earl of Aylesford* (*ubi sup.*).
(*x*) *Hunt* v. *Hunt*, [1897] 2 Q. B. 304; 67 L. J. Q. B. 18.

child does not disentitle her to the annuity payable under the deed (*y*). So, on the other hand, if a husband go to a distant country, and unreasonably begin divorce proceedings there against his wife, and serve her with a notice of them, such conduct is "molestation," and so a breach of the covenant not to molest (*z*); but a suit for judicial separation is not a breach (*a*).

Restraint of Proceedings in Divorce.—Formerly the Court would restrain by injunction either of the parties from committing or attempting to commit a breach of the covenants in the deed; thus, a covenant on the part of a husband in a separation deed, that it should be lawful for the wife to live separate and apart from him, and that he would not compel her to cohabit with him by any legal proceedings, was held enforceable in equity by injunction against proceedings in the Divorce Court for the restitution of conjugal rights (*b*); and where by a deed of separation a husband covenanted with a trustee to make an allowance to his wife, and the trustee covenanted on behalf of the wife neither to sue for restitution of conjugal rights or alimony, nor to molest, trouble, or disturb the husband, and shortly after the execution the wife commenced proceedings in the Divorce Court for a judicial separation and for alimony, the husband was held entitled to a perpetual injunction restraining the proceedings in the Divorce Court (*c*).

Equitable Defences.—But now, the old remedy by prohibition, or injunction, or by an indefinite stay of proceedings, on the ground of a covenant in a separation deed, is no longer available, for by the Judicature Act (*d*) that remedy is taken away; but every matter of equity on which an injunction against the prosecution of any cause or proceeding might have been obtained, either unconditionally or on any terms or conditions, may be relied on by way of defence. Where one of the parties to a deed of separation commits a breach of a covenant not to sue for restitution of conjugal rights, the separation deed itself may be pleaded by way of equitable defence (*e*).

A covenant not to take proceedings in respect of past offences

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(*y*) *Sweet* v. *Sweet*, [1895] 1 Q. B. 12; 64 L. J. Q. B. 108.
(*z*) *Hunt* v. *Hunt* (*ubi sup.*).
(*a*) *Thomas* v. *Everard*, 6 H. & N. 448; 30 L. J. Ex. 214.
(*b*) *Hunt* v. *Hunt*, 31 L. J. Ch. 161; see *Rowley* v. *Rowley*, L. R. 1 Sc. & Div. App. 63; 35 L. J. P. M. & A. 110.
(*c*) *Flower* v. *Flower*, 25 L. T. 902.
(*d*) 36 & 37 Vict. c. 66, s. 24, sub-s. 5.
(*e*) *Marshall* v. *Marshall*, 5 P. D. 19; 48 L. J. P. D. & A. 49; approved in *Clark* v. *Clark*, 10 P. D. 188; 54 L. J. P. 99.

will be enforced (*f*), but a wife may rely upon cruelty before and adultery after the deed (*g*). Where the husband becoming bankrupt the annual sum covenanted to be paid was provable in the bankruptcy, but no action could be brought against the husband after the bankruptcy, the deed was held no bar to proceedings for restitution of conjugal rights (*h*). Where the separation deed was repudiated by the husband, it was held that the husband could not enforce the deed, and the wife obtained a divorce (*i*), but where the husband had merely failed to pay, notwithstanding the wife's efforts to enforce payment, no desertion had occurred, there being no repudiation of the deed (*k*).

Specific Performance of Executory Agreements.—The Court will now decree specific performance of agreements to execute a deed of separation, where the stipulations are not contrary to law, or in contravention of public policy (*l*). But the agreement must be founded on sufficient consideration (*m*). An agreement for compromise of a divorce suit may be made an order of Court in any division of the High Court (*n*).

Consideration.—Every separation deed must be founded on valuable consideration. The following are instances of good and sufficient consideration for entering inot an arrangement for separation: Forbearance to sue for a divorce (*o*), or for a nullity of marriage (*p*); a compromise of a misdemeanour by one party towards the other (*q*). Though not absolutely necessary, the usual consideration for the husband's covenant to pay an annuity to the wife is the covenant of the trustees on her behalf to hold the husband indemnified against her debts (*r*). A covenant by the trustees to indemnify the husband against his own debts would be sufficient (*s*); so, too, a covenant to pay the husband an annuity, or a covenant by the husband to pay

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(*f*) *Rowley* v. *Rowley*, 3 Sw. & Tr. 338; 29 L. J. P. M. & A. 15.
(*g*) *Ehlers* v. *Ehlers*, 113 L. T. 1215.
(*h*) *McQuiban* v. *McQuiban*, [1913] P. 208; 83 L. J. P. 19.
(*i*) *Looker* v. *Looker*, [1918] P. 132; 87 L. J. P. 72.
(*k*) *Smith* v. *Smith*, [1915] P. 288; 85 L. J. P. 16.
(*l*) See *Vansittart* v. *Vansittart*, 2 De G. & J. 249; 27 L. J. Ch. 289.
(*m*) *Wilson* v. *Wilson*, 1 H. L. Cas. 538; *Aldridge* v. *Aldridge* (*otherwise Morton*), 13 P. D. 210; 58 L. J. P. 8.
(*n*) *Smythe* v. *Smythe*, 18 Q. B. D. 544; 56 L. J. Q. B. 217.
(*o*) *Augier* v. *Augier*, Prec. Ch. 496.
(*p*) *Wilson* v. *Wilson* (*ubi sup.*).
(*q*) See *Elworthy* v. *Bird*, 2 Sim. & St. 372; *Macgregor* v. *Macgregor*, 21 Q. B. D. 424; 57 L. J. Q. B. 591.
(*r*) *Wilson* v. *Wilson* (*ubi sup.*); see *Gibbs* v. *Harding*, L. R. 5 Ch. App. 336; 39 L. J. Ch. 374.
(*s*) *Wilson* v. *Wilson* (*ubi sup.*).

half the costs of the deed of separation (*t*). A release by the husband of his rights in respect of his wife's acquired property would be a sufficient consideration for an annuity to be paid to him by the wife (*u*). An agreement by the husband to execute a deed of separation is a good consideration for a third party undertaking to pay the husband's debts (*x*). A covenant by the wife's trustee in a deed of separation binds her as a party to it to observe the covenants entered into on her behalf (*y*). A covenant by the wife to live apart has been held to be good consideration, and to support an assignment of leasehold trust property to trustees until arrears were satisfied as against her husband's trustee in bankruptcy (*z*).

The consideration for these agreements must not be illegal, or they will be null and void; thus, an agreement based upon a provision to facilitate proceedings for a divorce would be invalid (*a*); or an omission of a *dum casta vixerit* clause with the intent that the wife might be at liberty to commit adultery (*b*).

The payment of money by a third person to induce the parties to live separate would be an illegal consideration, and the arrangement based upon it would be futile and inoperative (*c*). The illegality of separation deeds is not presumed, but must be proved (*d*).

Enforcement of Deeds.—It is quite possible, notwithstanding the validity of these deeds, that one of the parties to an agreement of this kind might so misconduct himself or herself that on equitable principles the Court would refuse to enforce specific performance at his or her instance (*e*); but a mere trifling breach of a covenant by a party will not disentitle him to a specific performance of the deed (*f*). The Court of Probate and Divorce can under its statutory powers act on equitable principles in construing or giving effect to these deeds; and if a state of facts is proved to exist which was not in contemplation

(*t*) *Gibbs* v. *Harding* (*ubi sup.*). Any annuity agreed to be paid in advance is not apportionable. *Trevalion* v. *Anderton*, 66 L. J. Q. B. 489.
(*u*) *Logan* v. *Birkett*, 1 Myl. & K. 220.
(*x*) *Jones* v. *Waite*, 9 Cl. & F. 101; 8 L. J. Ex. 305.
(*y*) *Clark* v. *Clark*, 10 P. D. 188; 54 L. J. P. 99.
(*z*) *Re Weston, Davies* v. *Tagart*, [1900] 2 Ch. 164; 69 L. J. Ch. 555.
(*a*) *Hope* v. *Hope*, 26 L. J. Ch. 417.
(*b*) *Fearon* v. *Earl of Aylesford*, 14 Q. B. D. 792; 54 L. J. Q. B. 33.
(*c*) See *Jones* v. *Waite* (*ubi sup.*).
(*d*) *Ibid.*
(*e*) *Besant* v. *Wood*, 12 Ch. D. 605; 48 L. J. Ch. 497.
(*f*) *Ibid.*; and see *Crouch* v. *Waller*, 7 W. R. 318. See also *Fearon* v. *Earl of Aylesford* (*ubi sup.*).

of the parties when the agreement was executed, owing to the fault or misconduct of one of the parties (as where the husband was guilty of incestuous adultery after its execution) the other party is not prevented by the restraining covenants of the deed from enforcing the full and ample remedy to which he or she is entitled (*g*); and though a deed of separation is not an agreement that the parties to it should live apart in chastity, yet, in the case of a husband, gross misconduct, that is, misconduct of a nature so entirely different from that which the parties were providing for when they entered into the deed of separation, might prevent him from relying on the deed, and might entitle the wife to disregard the bargain made between them for maintenance (*h*).

Maintenance.—Where a wife in an agreement for separation has agreed to accept from her husband a certain sum for maintenance to be paid in any event, whether the marriage should be afterwards dissolved or not, and such agreement contained no express provision by her not to sue for increased alimony in the event of a divorce grounded on future misconduct of her husband, the Court has power under the Divorce Acts, after a decree for *dissolution of the marriage* on a fresh petition by her based on misconduct of the husband since the agreement, to disregard the agreement and order permanent alimony to be paid her at a rate exceeding the amount specified in the agreement, if the husband's means permit of such increase (*i*). So again, where by a separation deed a wife has agreed to accept a sum certain for maintenance, the deed to become void if the marriage is afterwards dissolved for any future misconduct of either party, the Court has power to order the payment of permanent alimony to her after a decree for *judicial separation* by reason of her husband's misconduct since the execution of the deed, if there has been such an alteration of circumstances as renders it unjust that she should be bound by the deed (*k*). Where a husband has in an agreement for separation agreed to make his wife an allowance, and she has agreed to maintain the

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(*g*) *Morrall* v. *Morrall*, 6 P. D. 98; 50 L. J. P. D. & A. 62. See *Bishop* v. *Bishop*, *Judkins* v. *Judkins*, [1897] P. 138; 66 L. J. P. 69; *Gandy* v. *Gandy*, 30 Ch. D. 57; 54 L. J. Ch. 1154.

(*h*) *Gandy* v. *Gandy*, 7 P. D. 168; 51 L. J. P. & D. 41, reversing 7 P. D. 77.

(*i*) *Bishop* v. *Bishop*, [1897] P. 138; 66 L. J. P. 69. In this case the Court of Appeal expressed a doubt whether the wife could by any such express provision debar herself of the right to apply for an increased alimony in the suit for the dissolution of her marriage.

(*k*) *Judkins* v. *Judkins*, [1897] P. 138; 66 L. J. P. 69.

children of the marriage out of it, and she afterwards files her petition for dissolution of the marriage, the Court has, notwithstanding the agreement, statutory jurisdiction (*l*) to make provision for the maintenance and education of the children (*m*). An annuity covenanted to be paid by the husband to the wife for her life on the death of the husband becomes payable by his executors (*n*).

Deduction of Income Tax.—Income tax may be deducted from the annuity by the husband where no provision is made by the deed (*o*), but he must account for the deductions to the Revenue authorities (*p*). The covenant should not be to pay so much free of income tax, this being void under the Income Tax Acts (*q*), but a covenant is good to pay such a sum as will amount after deduction of income tax to so much per annum (*r*). So, too, is a covenant to pay the trustees a sum equivalent to the amount deducted for income tax in the preceding year (*s*).

Power of Divorce Court over Separation Deeds.—The power of the Divorce Court to alter or disregard separation deeds depends upon whether the conduct of the one party entitles the other party to a dissolution of the marriage tie, because in the case of judicial separation "the Legislature has not thought fit to give the same powers to the Court that it has given in the case of dissolution of marriage. In the case of dissolution of marriage the Court has had conferred upon it the right to vary not only post-nuptial but ante-nuptial settlements, and to deal with them in any way which may be thought just and expedient. But in the case of judicial separation, there being no such power, the deed remains binding. The wife is entitled to the annuity secured her by the deed, the husband is liable to pay the annuity. It is impossible, therefore, for the Court to allot such alimony as it may think just, because in the case of its thinking that the amount of alimony should be less than the annuity secured by the deed, it has no power of setting aside the deed, and no power to stop an action brought under the covenants of the

(*l*) 20 & 21 Vict. c. 85, s. 35; 22 & 23 Vict. c. 61, s. 4.

(*m*) *Barry* v. *Barry*, [1901] P. 87; 70 L. J. P. 17.

(*n*) *Randle* v. *Gould*, 8 E. & B. 457; 27 L. J. Q. B. 57. The deed was held to be not merely a separation deed but a post-nuptial settlement.

(*o*) *Re Barry's Trusts*, *Barry* v. *Smart*, [1906] 1 Ch. 768; 75 L. J. Ch. 415, affirmed, [1906] 2 Ch. 358; 75 L. J. Ch. 676.

(*p*) *Bayley* v. *Bayley*, [1922] 2 K. B. 227; 91 L. J. K. B. 886.

(*q*) *Blount* v. *Blount*, [1916] 1 K. B. 230; 85 L. J. K. B. 230; *Burroughs* v. *Abbott*, [1922] 1 Ch. 86.

(*r*) *Re Wooldridge*, *Wooldridge* v. *Coe*, [1920] W. N. 78.

(*s*) *Re Gordon's Settlement*, *Hunt* v. *Mortimer*, [1924] 1 Ch. 146; 93 L. J. Ch. 187.

deed by the trustees against the husband. It is, therefore, a case where the ordinary powers of the Court cannot be exercised, except in one direction, viz., by increasing the amount of alimony" (*t*). The power of the Divorce Court to make just and proper orders for alimony is contained in 20 & 21 Vict. c. 85, s. 17. The effect of the law is that where the conduct of the husband does not entitle his wife to a divorce, but only to a judicial separation, the wife will be barred by her trustee's agreement and contract to accept a certain sum by way of alimony; and the Court has no power to increase that amount; that is, the trusts of a separation deed are not put an end to by a mere judicial separation (*u*). But where the husband's misconduct amounts to a cause which would entitle the wife to a dissolution, or she has by reason of such conduct obtained a dissolution of marriage, the Court has more ample power over the amount to be ordered as alimony, and the wife in such a case will not be restrained by the covenant from asking for a larger amount than that agreed to be allowed her by the deed (*x*).

Arrangement for Prospective Separation Bad.—A mere provision for future and prospective separation is bad (*y*); and this is so whether the provision is made by deed or by articles; and a deed has been held to be void which in terms provided for an immediate separation, but which really meant to provide for a future separation (*z*). A condition in a gift by a third party would be void if it tended to a separation (*a*), but a trust for the benefit of the wife, though it only lasts during co-habitation, with a gift over to the husband in the event of co-habitation ceasing, was held valid as a conditional limitation and not defeasible as on a void condition (*b*). An agreement made before and confirmed after marriage, by which the parties agreed to live apart, was held to be void and to form no answer to the wife's petition for restitution of conjugal rights (*c*). A deed or arrangement for separation must be contemporaneous with, or immediately followed by, actual separation, for co-

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(*t*) Per Jessel, M.R., in *Gandy* v. *Gandy*, 7 P. D. 168, 172; 51 L. J. P. & D. 41.

(*u*) See *Jee* v. *Thurlow*, 2 B. & C. 547.

(*x*) *Wilkinson* v. *Wilkinson*, 69 L. T. 459.

(*y*) *Cocksedge* v. *Cocksedge*, 5 Ha. 397; *Hindley* v. *Westmeath*, 6 B. & C. 200; *Westmeath* v. *Salisbury*, 5 Bli. (N.R.) 339.

(*z*) *Hindley* v. *Westmeath* (*ubi sup.*).

(*a*) *Cartwright* v. *Cartwright*, 3 De G. M. & G. 982.

(*b*) *Re Hope Johnstone, Hope Johnstone* v. *Hope Johnstone*, [1904] 1 Ch. 470; 73 L. J. Ch. 321.

(*c*) *Brodie* v. *Brodie*, [1917] P. 271; 86 L. J. P. 140.

habitation after its execution renders it null and void (*d*). In one case (*e*), however, where the parties were living together, a deed which contained an arrangement by which the wife could live apart if circumstances should render it necessary, was held valid notwithstanding such clause; but perhaps less on the ground that it was a deed providing for future separation than that it was in the nature of a family arrangement and the termination and compromise of a pending suit for divorce. A deed providing for the wife's support on the occasion of an immediate separation is good (*f*). Where the future separation is dependent on the consent or approbation of third persons, as, for instance, the trustees, then the deed was formerly held good (*g*); but it is more than doubtful whether such would be the case now (*h*).

Determination by Cohabitation.—A separation deed entered into in order to determine the relationship of the parties while living apart and separate is put an end to by reconcilement and renewed cohabitation (*i*); but the reconcilement and re-cohabitation must be real, and mere dwelling under the same roof, but in a state of animosity towards one another, would be insufficient (*k*); so would be mere communication by letters without cohabitation (*l*). "The true principle is that a renewal of cohabitation will put an end to all or any of the provisions of a separation deed, so far as the language of the deed properly construed by the light of surrounding circumstances shows that its provisions were only intended to take effect whilst the separation lasted" (*m*). If it is a deed which has separation as only one of its objects, a resumption of cohabitation does not necessarily put an end to it. Resumption of cohabitation is not *per se* accord and satisfaction of arrears of an annuity covenanted to be paid to the wife while living apart (*n*).

(*d*) *Durant* v. *Titley*, 7 Price, 577.

(*e*) *Joddrell* v. *Joddrell*, 15 L. J. Ch. 17. See *Vandergucht* v. *De Blaquière*, 5 Myl. & Cr. 229.

(*f*) *Jee* v. *Thurlow*, 2 B. & C. 547; *Jones* v. *Waite*, 9 Cl. & F. 101; 8 L. J. Ex. 305; *Courtney* v. *Courtney*, [1923] 2 Ir. R. 31.

(*g*) *Rodney* v. *Chambers*, 2 East, 283.

(*h*) See *Cocksedge* v. *Cocksedge*, 5 Ha. 397; *Proctor* v. *Robinson*, 14 W. R. 381.

(*i*) *Besant* v. *Wood*, 12 Ch. D. 605; 48 L. J. Ch. 497; *Nicol* v. *Nicol*, 31 Ch. D. 524; 55 L. J. Ch. 437. In the latter case the Court of Appeal questioned the dictum of Lord Campbell in *Randle* v. *Gould*, 8 El. & B. 457.

(*k*) *Bateman* v. *Ross*, 1 Dow, H. L. 235.

(*l*) *Slatter* v. *Slatter*, 1 Y. & C. Ex. 28; *Frampton* v. *Frampton*, 5 Jur. 980; 4 Beav. 287.

(*m*) Per Bowen, L.J., in *Nicol* v. *Nicol* (*ubi sup.*).

(*n*) *Macan* v. *Macan*, 70 L. J. K. B. 90.

Temporary and Permanent Trusts.—The intention of the parties has to be gathered from the terms of the deed of separation as to whether its provisions are temporary or permanent in character (*o*). The trusts may take effect as being only of a temporary nature during the period that the parties shall live separate and apart, or they may take effect as a permanent settlement to last during the joint lives of the parties, or during the life of one of them. In the first case the trusts will be active only during the suspension of the cohabitation of the husband and wife; and if the two are reconciled and resume cohabitation, the whole object of the deed is gone (*p*). In the second case the separation deed may take the form of a permanent settlement, where other matters than the continuance of the separation are provided for, or where the covenant to pay the annuity is absolute and not limited only to the period of separation; thus, where the interests of existing children are provided for, resumption of cohabitation of the parents does not affect the provisions for the children (*q*). "There is another class of cases where the deed contains other and separate provisions—a provision for an annuity during the life of the wife in some cases, a particular house given up to her in others; and where there are absolute provisions of that sort the deed is a perfectly valid deed, and may be enforced by either party notwithstanding re-cohabitation" (*r*); as where a husband covenanted to pay an annuity to his wife during their joint lives (*s*); or where the husband agreed to pay the wife an annual sum *while she should live chastely* (*t*); or where the separation deed provides that if the husband and wife should afterwards agree to live together again, such cohabitation should in no way alter the trusts of the deed (*u*); and such an agreement if the parties at the time of entering into it were separated or intended immediately to separate is good and valid (*x*); or where the deed makes provision for a child or children of the marriage (*y*). If in such cases the parties re-cohabit, the trusts

(*o*) *Randle* v. *Gould*, 8 E. & B. 457; 25 L. J. Q. B. 57; *Nicol* v. *Nicol* (*ubi sup.*); *Rowell* v. *Rowell*, [1900] 1 Q. B. 9; 69 L. J. Q. B. 55.
(*p*) *Negus* v. *Forster*, 46 L. T. 675; *Webster* v. *Webster*, 22 L. J. Ch. 837.
(*q*) *Ruffles* v. *Alston*, L. R. 19 Eq. 539; 44 L. J. Ch. 308; *Re Spark's Trusts*, *Spark* v. *Massey*, [1904] 1 Ch. 451; 73 L. J. Ch. 259.
(*r*) Per Coleridge, C.J., in *Negus* v. *Forster* (*ubi sup.*). See *Dodd* v. *Cary*, 13 L. J. Ch. 103.
(*s*) *Grant* v. *Budd*, 30 L. T. 319.
(*t*) *Negus* v. *Forster* (*ubi sup.*).
(*u*) *Wilson* v. *Mushett*, 3 B. & Ad. 743.
(*x*) *Ibid.*
(*y*) *Ruffles* v. *Alston* (*ubi sup.*).

continue (*z*), and if they separate again they revive in full force (*a*). The effect of such a covenant as to pay an annuity to the wife for the joint lives of herself and husband, is that it is payable to her though she has committed adultery since the separation, and the marriage has been dissolved in consequence (*b*).

Dum Casta Clause.—It has been decided that a *dum casta* clause is not one of the usual covenants in a deed of separation, but must be expressly stipulated for (*c*), though where the clause appears only in a recital it has been held to control an ambiguous covenant (*d*). It is a clause over which the Court of Divorce has jurisdiction in allowing alimony (*e*). Where a husband covenanted to pay his wife £100 a year while she should live chastely, and for ten years lived apart, but subsequently resumed cohabitation, but seven years afterwards again separated, and the wife obtained a decree of judicial separation, with alimony at the rate of £180 per annum, it was held that the deed was not rescinded by cohabitation (*f*). Though this clause is not usually inserted in a deed of separation, yet if the wife while living apart is guilty of adultery, on which a successful petition for dissolution is brought by the husband, the original separation may be varied by inserting this clause (*g*), and it will be inserted where the Court exercises its discretion in favour of the husband on condition that he make an allowance to his wife (*h*). Where there is no *dum casta* clause, the wife can claim her annuity, though she commit adultery during separation (*i*).

Validity against Creditors.—The mere agreement of the parties to execute a deed of separation and to live apart is sufficient to render it binding on both of them, both as regards their pecuniary and social status towards one another. But as regards creditors and purchasers (*k*), that is not so, and the deed being post-nuptial, to be effectual must be supported by

(*z*) See *Charlesworth* v. *Holt*, L. R. 9 Ex. 38; 43 L. J. Ex. 25.
(*a*) *Negus* v. *Forster* (*ubi sup.*); *Nicol* v. *Nicol* (*ubi sup.*).
(*b*) *Charlesworth* v. *Holt* (*ubi sup.*).
(*c*) *Hart* v. *Hart*, 18 Ch. D. 670; 50 L. J. Ch. 697.
(*d*) *Crouch* v. *Crouch*, [1912] 1 K. B. 378; 81 L. J. Ch. 275.
(*e*) *Corbett* v. *Corbett*, 14 P. D. 7; 58 L. J. P. 17; *Lister* v. *Lister*, 15 P. D. 4.
(*f*) *Negus* v. *Forster* (*ubi sup.*).
(*g*) *Saunders* v. *Saunders and Beck*, 69 L. T. 498.
(*h*) *Squire* v. *Squire and O'Callaghan*, [1905] P. 4; 74 L. J. P. 1.
(*i*) *Sweet* v. *Sweet*, [1895] 1 Q. B. 12; 64 L. J. Q. B. 108; *Wasteneys* v. *Wasteneys*, [1900] A. C. 446; 69 L. J. P. C. 83.
(*k*) *Fitzer* v. *Fitzer*, 2 Atk. 511; *Clough* v. *Lambert*, 10 Sim. 174; *Cowx* v. *Foster*, 1 J. & H. 30.

valuable consideration. The Court, however, will not weigh the consideration in too nice scales; the following has been held sufficient: the usual indemnity against the wife's debts (*l*), an indemnity against the husband's own debts (*m*), the relinquishment by the wife of her claim to alimony (*n*), and probably a compromise of litigated rights by the wife would be held a valuable and sufficient consideration (*o*).

Custody of the Children.—An agreement by the father in a separation deed or articles of separation to surrender the custody of the infant children to the mother was in former times invalid, and vitiated the articles of separation *in toto*; for it was held that he could not derogate from his own rights, and for him to attempt to do so was contrary to public policy (*p*); for the law had given him their custody unless he had done something to forfeit it (*q*). But an important alteration was effected by the Infants' Custody Act, 1873 (*r*), for it enacts (*s*) that "no agreement contained in any separate deed made between the father and the mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother: Provided always, that no Court shall enforce any such agreement if the Court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto." The result of this is that the husband can agree with his wife on separation to allow her to have the care and custody of the children, and the agreement can be enforced. But as the benefit of the infant child is ever the chief concern of the Court, if it subsequently becomes evident that the custody of the mother would be harmful to the infant, the father may apply to the Court to rescind the agreement and recover its custody (*t*). Every such agreement in a separation deed is therefore accompanied by a proviso that the Court shall not enforce the agreement as regards the children unless it be to their advantage (*u*), and where the Court has deprived the husband of the custody of

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(*l*) *Stephens* v. *Olive*, 2 Bro. C. C. 90.
(*m*) *Wilson* v. *Wilson*, 1 H. L. Cas. 538.
(*n*) *Hobbs* v. *Hull*, 1 Cox, Eq. Cas. 445.
(*o*) See *Nunn* v. *Ladbroke*, 8 T. R. 521; *Joddrell* v. *Joddrell*, 15 L. J. Ch. 17; *Wilson* v. *Wilson* (*ubi sup.*).
(*p*) *Vansittart* v. *Vansittart*, 27 L. J. Ch. 222, 289.
(*q*) *Hunt* v. *Hunt*, 28 Ch. D. 606.
(*r*) 36 Vict. c. 12.
(*s*) Sect. 2.
(*t*) *Re Besant*, 11 Ch. D. 508; 48 L. J. Ch. 497.
(*u*) *Ibid.*

the children he may be held bound by his covenant to maintain them, although under that covenant he was to have the custody (*x*). This subject of the custody and control of children is further pursued in another portion of this book (*y*).

Section 2.

Dissolution of Marriage.

If, however, the parties are unable or unwilling to settle their matrimonial differences in private by means of a separation deed, they may have recourse to the Divorce Court for relief. It is not here intended to give more than a mere outline of the powers and jurisdiction of the Divorce Court.

Jurisdiction of Divorce Court.—Prior to the year 1858 the ecclesiastical Courts had no power to divorce *a vinculo matrimonii*, or dissolve the union of married persons; that jurisdiction was confined to decrees of divorce *a mensa et thoro*, or judicial separation, by which those who were united in the bonds of marriage were enabled for specified causes to live apart, and not compelled to cohabit, and to sentences of nullity. But in order to meet the exigencies of different cases, especially in cases where, by the adultery of the wife, bastard issue might be fathered on the husband, *privilegia* or private relief Acts of Parliament were from time to time passed which operated to dissolve the tie, and enabled either party to re-marry during the life of the other (*z*). The powers of the old ecclesiastical Courts and further and wider powers were conferred upon the Divorce Court by the Acts of 1857 (*a*) and 1858 (*b*); this Court now forms a branch of the Probate, Divorce, and Admiralty Division of the High Court of Justice. The Administration of Justice Act, 1920, enabled provision to be made for the trial of matrimonial causes at assizes, and under the Statutory Rules and Orders, 1922, undefended causes and poor persons' causes are triable at assizes (*c*).

(*x*) *Gandy* v. *Gandy*, 7 P. D. 168; 5 1L .J. P. 41.

(*y*) See *post*, Part II., Parent and Child, chap. ii.

(*z*) Such Acts are usually intituled as follows: "An Act to dissolve the marriage of A. B. with C. D., and to enable him to marry again." In the recitals of the Act the decree of judicial separation (if any) of the ecclesiastical Court was mentioned, but such decree was not a condition precedent to the passing of the Act.

(*a*) 20 & 21 Vict. c. 85.

(*b*) 21 & 22 Vict. c. 108.

(*c*) 10 & 11 Geo. V. c. 81, s 1.

Grounds for Divorce.—The grounds for relief in a petition for dissolution of marriage were, where the husband is petitioner, the adultery of the wife (*d*); where the wife is petitioner, they were incestuous adultery, bigamy with adultery (*e*), sodomy, bestiality, or adultery coupled with such cruelty (which need not be necessarily physical violence (*f*)) as without adultery would have entitled her to a divorce *a mensa et thoro*, or adultery coupled with desertion without reasonable excuse for two years or upwards (*g*). By the Matrimonial Causes Act of July, 1923, adultery by the husband since the date of the Act was made a sufficient ground for divorce. The words "incestuous adultery" and "bigamy with adultery" in the Act of 1857 were repealed, and the necessity of proving cruelty or desertion dispensed with (*h*).

The law relating to divorce is consolidated in the Supreme Court of Judicature (Consolidation) Act, 1925 (*i*), and under its provisions the grounds for divorce are, when the petition is presented by the husband, adultery by the wife since the marriage; when the petition is presented by the wife, rape, sodomy, bestiality, or, since July 17, 1923, adultery. But the wife is able to bring forward grounds as though the Matrimonial Causes Act, 1923, had not been passed, and on any petition for divorce on the ground of adultery and cruelty or adultery and desertion, the husband and wife shall be competent and compellable to give evidence with respect to the cruelty or desertion (*k*). The adulterer must be made a co-respondent when the husband is petitioner unless the Court excuses his being

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(*d*) 20 & 21 Vict. c. 85, s. 27.

(*e*) The adultery must be substantially proved; mere evidence of a bigamous marriage does not satisfy the requirements of the statute; *Ellam* v. *Ellam*, 58 L. J. P. 56.

(*f*) *Bethune* v. *Bethune*, 63 L. T. 259; *Walmesley* v. *Walmesley*, 69 L. T. 152. See *Russell* v. *Russell*, [1895] P. 315, 322; 64 L. J. P. 105, for a definition of cruelty. The cruelty must be of such a nature as to cause danger to life, limb or health, or a reasonable apprehension of such danger; thus a false charge of having committed an unnatural offence brought by a wife against her husband, and known by her to be false, is not *per se* sufficient evidence of legal cruelty. *Russell* v. *Russell*, [1897] A. C. 395; 66 L. J. P. 122. Indeed, where the parties are living apart, anything short of physical violence would seem to be insufficient evidence of legal cruelty. *Ibid.* The communicating of a venereal disease is sufficient unless the husband can prove circumstances showing an absence of legal cruelty, *Browning* v. *Browning*, [1911] P. 161; 80 L. J. P. 74. Acts of cruelty not in themselves sufficient to obtain a decree upon may be sufficient to revive earlier gross acts of cruelty which have been condoned, *Moss* v. *Moss*, [1916] P. 155; 85 L. J. P. 182.

(*g*) 20 & 21 Vict. c. 85, s. 27.

(*h*) 13 & 14 Geo. V. c. 19.

(*i*) 15 & 16 Geo. V. c. 49.

(*k*) Sect. 176.

made party (*l*), and the husband may, on a petition for divorce or judicial separation or for damages alone, claim damages, which claim will be tried on the same principles as the former action for criminal conversation. The Court may direct the application of such damages by way of settlement for the benefit of the children or as provision for the maintenance of the wife (*m*). Where the wife is petitioner the Court may direct the person charged to be made a respondent (*n*).

Effect of Decree.—The effect of a sentence of dissolution of marriage is that the parties are no longer husband and wife, and are strangers to one another as regards person and property (*o*), save so far as the statutory jurisdiction of the Court enables it to alter and vary the settlements whether ante-nuptial or post-nuptial (*p*), including a separation deed (*q*), and whether there are children or not (*r*). In many ways the effect of a decree of dissolution is as though the parties had never married (*s*). The parties are also enabled to re-marry, but if there is a right of appeal against the decree absolute the right of re-marriage is suspended during the time for appealing, and if an appeal is entered until it is dismissed. As to the limitation by reason of affinity, see Part I., chapter iii., Impediments to Marriage. The decree absolute for the dissolution of the marriage must be made before either of the spouses dies; if not so made the parties die husband and wife (*t*). The expression in "a settlement surviving the coverture" is satisfied if the coverture is put an end to by a decree of dissolution of marriage (*u*). The Court has also wide discretion on the question of alimony (*x*), by way of gross sum or annual sum, and may take into account the wife's fortune, if any, the ability of the husband to make payment and the conduct of the parties. The Court may also order a settlement of the wife's property for the benefit of the innocent party or of the children of the

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(*l*) Sect. 177.
(*m*) Sect. 189.
(*n*) Sect. 177.
(*o*) *Re Morrieson, Hitchins* v. *Morrieson*, 40 Ch. D. 30; 58 L. J. Ch. 80; in which *Bullmore* v. *Wynter*, 22 Ch. D. 619; 52 L. J. Ch. 456, was observed upon.
(*p*) 20 & 21 Vict. c. 85, s. 45; 22 & 23 Vict. c. 61, s. 5.
(*q*) *Worsley* v. *Worsley*, L. R. 1 P. & D. 648; 38 L. J. P. M. & A. 48.
(*r*) 41 Vict. c. 19, s. 3. But it is doubtful whether the Court of Divorce has power to interfere with the interests, rights and liabilities of persons not parties to the suit, *Re Crawford, Cooke* v. *Gibson*, [1905] 1 Ch. 11.
(*s*) See *Re Lesingham's Trusts*, 24 Ch. D. 703; 53 L. J. Ch. 333.
(*t*) *Stanhope* v. *Stanhope*, 11 P. D. 103; 55 L. J. P. 36.
(*u*) *Re Crawford, Cooke* v. *Gibson* (*ubi sup.*).
(*x*) 15 & 16 Geo. V. c. 49, s. 190.

marriage, and upon a petition for restitution by the husband may order such settlement for the benefit of the petitioner or the children as the Court thinks reasonable (*y*). The Court may order an innocent husband to make provision for a guilty wife if her circumstances warrant such order (*z*).

Defences.—On the hearing of the petition the Court must satisfy itself as to the facts alleged and as to whether the parties have been accessory or have connived or condoned, and must inquire into any counter charges. These are matters which, if proved to the satisfaction of the Court, are a complete answer to the petition, and leave the Court no discretion but to dismiss it. There are also discretionary bars, or facts which if proved leave to the Court a discretion as to the decree, such as adultery of the petitioner (*a*), unreasonable delay in presenting or prosecuting the petition, cruelty, desertion, and conduct conducing (*b*) to the adultery complained of (*c*).

Section 3.

Judicial Separation.

The husband and wife may also obtain a decree of judicial separation, or divorce *a mensa et thoro*, from each other for various grounds (*d*). The principle upon which each of these grounds rests is that it must be such as *per quod consortium amittitur*; thus, the husband or wife may obtain a decree by reason of adultery, or cruelty, or desertion without cause for not less than two years, failure to comply with a decree for restitution of conjugal rights, or on any ground on which a decree for divorce *a mensa et thoro* might have been pronounced before the Matrimonial Causes Act, 1857 (*e*). The defences to a suit for judicial separation are practically the same as those in suits for dissolution of marriage. The consequences of this decree are not so wide as those of a dissolution of marriage; the parties are still husband and wife, they are not free to re-marry,

(*y*) 15 & 16 Geo. V. c. 49, s. 191.
(*z*) *Ashcroft* v. *Ashcroft and Roberts*, [1902] P. 270; 71 L. J. P. 125.
(*a*) See *Whitworth* v. *Whitworth*, [1893] P. 85; 62 L. J. P. 71; *Potter* v. *Potter*, 67 L. T. 721.
(*b*) Sect. 178.
(*c*) If a man marry an unchaste woman he must not expose her to temptation, or he will be held guilty of conduct conducing, *Baylis* v. *Baylis*, 1 P. & D. 395; 36 L. J. P. & M. 89.
(*d*) 15 & 16 Geo. V. c. 49, s. 185.
(*e*) Sect. 185.

and they may come together and live as husband and wife again without going through any ceremony of re-marriage. The Court has not the same power of dealing with settlements on a sentence of judicial separation as on one of dissolution of marriage (*f*).

The effect of a decree of judicial separation is put an end to by the resumption of cohabitation on the part of the spouses (*g*). But it would appear that mere isolated acts of matrimonial cohabitation subsequent to the separation would not put an end to the separation if it was not the intention of the parties to abrogate the separation (*h*).

The effect of dissolution of marriage and judicial separation on the property rights of the spouses has been discussed under various headings.

Jactitation of Marriage.—The suit for jactitation of marriage is brought to obtain a declaration that two persons are not married to each other, where one party maliciously boasts or gives out (*jactitatio*) that he or she is married to the other, in order to prevent a common reputation of their marriage from ensuing. Unless the defendant makes out a proof of the actual marriage, he or she is enjoined perpetual silence on that head (*i*). Before Lord Hardwicke's Act (*k*) this suit was frequently brought owing to the great facilities for clandestine and irregular marriages. But of late years it is not very frequently resorted to. In this suit there are three defences: (1) Denial of the boasting; (2) the truth of the representations; (3) full authorization by the complainant of the pretension, though no marriage ever took place; that is, the representation, though false, is not malicious (*l*). This last defence is based on the principle that a complainant who has for some time authorized the respondent to make representations such as those afterwards complained of does not come into Court with clean hands to seek relief *ex debito justitiæ* (*m*). The Supreme Court of Judicature (Consolidation) Act, 1925 (*n*), repeals section 6 of the Matrimonial Causes Act, 1857, which transferred the jurisdiction *inter alia* in suits for jactitation of marriage to the Court for divorce and matrimonial causes from the ecclesiastical Courts. No reference is made in the

(*f*) *Gandy* v. *Gandy*, 7 P. D. 168; 51 L. J. P. & D. 41.
(*g*) See *Haddon* v. *Haddon*, 18 Q. B. D. 778; 56 L. J. Q. B. 69.
(*h*) *Rowell* v. *Rowell*, [1900] 1 Q. B. 9; 69 L. J. Q. B. 55.
(*i*) 3 Bl. Com. 93.
(*k*) 26 Geo. III. c. 33.
(*l*) *Hawke* v. *Corri*, 2 Hag. Con. R. 280.
(*m*) *Thompson* v. *Rourke*, [1893] P. 70; 62 L. J. P. 46.
(*n*) 15 & 16 Geo. V. c. 49.

enacting part of the Act to such suits, and an intending petitioner would be puzzled as to what Court to apply to; it may possibly be intended that this particular form of relief should be abolished.

Summary Jurisdiction Acts.—Under the Summary Jurisdiction (Married Women) Act, 1895 (*o*), a married woman, whose husband has been convicted summarily of an aggravated assault (*p*), or upon indictment of an assault, upon her and sentenced to pay a fine of more than £5 or to a term of imprisonment exceeding two months, or who has deserted her, or has been guilty of persistent cruelty to her, or has wilfully neglected to provide reasonable maintenance for her or her infant children, whom he is legally liable to maintain, may obtain more speedy relief than by petition for judicial separation in the Divorce Court from the court of summary jurisdiction for the district in which the husband has been convicted or the cause of the complaint has wholly or partially arisen (*q*). Under the Summary Jurisdiction (Separation and Maintenance) Act, 1925 (*r*), it is no longer necessary that the cruelty or neglect of the husband shall have caused the wife to live separately and apart from him. This Act adds further grounds upon which a married woman may obtain an order: (1) that the husband has been guilty of persistent cruelty to her children; (2) that the husband has insisted on having sexual intercourse with her while knowing that he was suffering from a venereal disease; (3) that the husband has compelled her to submit herself to prostitution. Conduct conducing may be deemed to be compulsion (*s*).

No order shall be enforceable or any liability accrue under it during joint residence, and the order lapses after three months' continuance of joint residence (*t*).

What Order may be Made.—The orders which a court of

(*o*) 58 & 59 Vict. c. 39.

(*p*) An "aggravated assault" is one which the justices having heard the case deem to be of such a nature as cannot be sufficiently punished by the ordinary punishments for assault, but deserving of a sentence of imprisonment up to six months, or a fine up to £20. (24 & 25 Vict. c. 100, s. 43.)

(*q*) Summary Jurisdiction (Married Women) Act, 1895, s. 4. See *Reg.* v. *Leresche*, 56 L. J. M. C. 158. The Court of Quarter Sessions or the Assize Court before which the husband is convicted becomes a court of summary jurisdiction for the purposes of this section. Section 8 provides that all applications under this Act shall be made in accordance with the Summary Jurisdiction Act, and in case of the conviction of husband for aggravated assault upon his wife, her application may, by leave of the Court, be made by summons, to be issued and made returnable immediately upon such conviction.

(*r*) 15 & 16 Geo. V. c. 51, s. 1, sub-s. 1.

(*s*) Sect. 1, sub-s. 2.

(*t*) Sect. 1, sub-s. 4.

summary jurisdiction can make may contain all or any of the following provisions: (a) That the applicant be no longer bound to cohabit with her husband (this prevents the wife from complaining afterwards of desertion during the period (*u*)). (b) That the legal custody of any children of the marriage while under sixteen years of age be committed to the applicant. (c) That the husband shall pay to the applicant personally, or, for her use, to any officer of the Court or third person on her behalf, a weekly sum not exceeding £2 which the Court shall consider reasonable, having regard to the means of both husband and wife. By the Married Women (Maintenance) Act, 1920 (*x*), an order (under which the legal custody of any children is committed to the applicant) may include a provision that the husband shall pay a weekly sum not exceeding 10s. for the maintenance of each such child until such child attains the age of sixteen. Before the Court can make an order of reasonable maintenance against the husband, it must be satisfied that he is in the receipt of actual earnings, or has the capability of earning them; and cannot dispense with the evidence of means (*y*); and the guiding principle and practice ought to be those of the Divorce Division in suits for judicial separation (*z*). A voluntary allowance is to be taken into consideration (*a*). (d) The payment by the applicant or the husband, or both, of the costs of court, and such reasonable costs of either of the parties as the Court may think fit (*b*). The effect of an order under this Act is, while it lasts, to make a married woman a *feme sole* just as though she had obtained a decree of judicial separation in the Divorce Court; thus, where she has obtained an order under section 5, a general grant of administration with justifying sureties may be made to her, passing over her husband without citing him (*c*). Costs of applications under this Act are not recoverable by action, but are dealt with exclusively by the court of summary jurisdiction (*d*). The Act of 1895 is retrospective; therefore a married woman deserted by her husband before it came into force may obtain relief under it (*e*); for it was passed

(*u*) *Harriman* v. *Harriman*, [1909] P. 123; 78 L. J. P. 62.
(*x*) 10 & 11 Geo. V. c. 63, s. 1.
(*y*) *Earnshaw* v. *Earnshaw*, [1896] P. 160; 65 L. J. P. 89.
(*z*) *Cobb* v. *Cobb*, [1900] P. 294; 69 L. J. P. 125.
(*a*) *Nott* v. *Nott*, [1901] P. 241; 70 L. J. P. 94.
(*b*) Sect. 5.
(*c*) *In the Goods of Jones*, 74 L. J. P. 27 and 164.
(*d*) *Cale* v. *James*, [1897] 1 Q. B. 418; 66 L. J. Q. B. 249.
(*e*) *Reg.* v. *Birtwhistle and Others*, 58 L. J. M. C. 158; *Lane* v. *Lane*, [1896] P. 133; 65 L. J. P. 63.

to cure an existing evil, and to give the parties injured a new remedy, and it is immaterial whether the injury arose before or after the Act was passed (*f*).

Facilities for Enforcement.—The Maintenance Orders (Facilities for Enforcement) Act, 1920, gives power to enforce in England orders made in the Dominions, and to make provisional orders against persons resident in the Dominions for enforcement therein.

Desertion.—To constitute desertion there must be a deliberate purpose of abandoning the conjugal society (*g*). Desertion is based upon facts, and these facts may and do vary with the surrounding circumstances of the parties (*h*). It further implies a cessation of cohabitation and an intention on the part of the guilty spouse to desert the other (*i*). It is not always or necessarily the guilty spouse who leaves the matrimonial home. The spouse who intends to bring the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion by driving the wife from home (*k*). A wife who without cause refuses to permit marital intercourse to her husband cannot allege desertion without reasonable cause by him if in consequence he refuses to live with her, but is herself in such circumstances guilty of desertion (*m*). Refusal of sexual intercourse does not constitute desertion, the parties living together (*n*), but the conduct of the husband in avoiding his wife's society although living together may amount to desertion (*o*). The innocent contracting of a disease by the wife is no ground for refusing to cohabit (*p*). Desertion also implies a wilful absenting on the part of one spouse, and such absence and cessation of cohabitation must be in spite of the other spouse (*q*); if, therefore, husband and wife mutually agree to separate, and separation follows, there is no desertion on the husband's part (*r*); that is to say, where the state of cohabitation has ceased to exist, whether by the adverse act of husband or

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(*f*) *Reg.* v. *Birtwhistle and Others (ubi sup.)*; *Lane* v. *Lane (ubi sup.)*.
(*g*) *Fitzgerald* v. *Fitzgerald*, L. R. 1 P. & D. 694; 38 L. J. P. M. & A. 14; *Reg.* v. *Leresche*, [1891] 2 Q. B. 418; 60 L. J. M. C. 153; and see *Wynne* v. *Wynne*, [1898] P. 18; 67 L. J. P. 5.
(*h*) See *Williams* v. *Williams*, 33 L. J. P. M. & A. 172.
(*i*) *Sickert* v. *Sickert*, [1899] P. 278; 68 L. J. P. 114.
(*k*) *Ibid.*
(*m*) *Synge* v. *Synge*, [1900] P. 180; 69 L. J. P. 106.
(*n*) *Jackson* v. *Jackson*, [1924] P. 19; 93 L. J. P. 1.
(*o*) *Powell* v. *Powell*, [1922] P. 278; 92 L. J. P. 6.
(*p*) *Butler* v. *Butler*, [1917] P. 244; 86 L. J. P. 135.
(*q*) *Thompson* v. *Thompson*, 27 L. J. P. M. & A. 65.
(*r*) *Smith* v. *Smith*, 28 L. J. P. M. & A. 27.

wife, or even by the mutual consent of both, desertion becomes impossible to either until their common life and home have been resumed (*s*); and the refusal by one at the request of the other to resume cohabitation does not constitute the offence of desertion (*t*). Where ill-usage has driven the wife from home, but it is followed by a request of the husband to return, the Court will consider the genuineness of the request, in deciding whether the husband has deserted the wife (*u*). But conjugal society or cohabitation does not necessarily imply that the parties must be living together continually under one roof (*x*). Desertion may take place even where there has been no cohabitation (*y*). Where a husband without reasonable excuse obtains from his wife an agreement to live apart from each other, which is acted upon, he commits desertion of her; and if she subsequently commit adultery, he will be disentitled to have the marriage dissolved (*z*). But if husband and wife live apart under a deed by which neither party is to require or attempt to compel the other to live together or cohabit or take any proceedings for the restitution of conjugal rights, he agreeing to pay her a weekly allowance which he fails to keep up, the wife has no remedy against him under this Act (*a*); and so where husband and wife are living apart under a separation deed, and the husband refuses to resume cohabitation (*b*). The effect of the deed is to put an end to desertion (*c*). But where the husband is, under an order obtained by guardians, to pay a weekly allowance in respect of the chargeability of his wife to the Poor Law, and she comes out of the workhouse and he does not make a *bona fide* offer to resume cohabitation, she is entitled to an order under this Act (*d*); and where she leaves her husband for a temporary purpose and for their mutual convenience, cohabita-

(*s*) *Fitzgerald* v. *Fitzgerald* (*ubi sup.*); *Piper* v. *Piper*, [1902] P. 198; 71 L. J. P. 100.

(*t*) *Ibid.*; *Reg.* v. *Leresche* (*ubi sup.*).

(*u*) *Thomas* v. *Thomas*, [1924] P. 194; 93 L. J. P. 61.

(*x*) *Bradshaw* v. *Bradshaw*, [1897] P. 24; 66 L. J. P. 31. This was a case of a married female domestic servant who never lived with her husband under the same roof, but was visited by him from time to time at her mistress's house, and had a child by him while in such service. The husband refused to receive his wife in the house where he lodged, or to give her any help towards her maintenance. The Court held that there was sufficient cohabitation to give jurisdiction to the justices under section 4 of the Summary Jurisdiction (Married Women) Act, 1895, and to make an order on the husband thereon.

(*y*) *De Laubenque* v. *De Laubenque*, [1899] P. 43; 68 L. J. P. 20.

(*z*) *Dagg* v. *Dagg and Speake*, 7 P. D. 17; 51 L. J. P. 19.

(*a*) *Pape* v. *Pape*, 20 Q. B. D. 76; 57 L. J. Q. B. 3.

(*b*) *Reg.* v. *Leresche*, [1891] 2 Q. B. 418; 60 L. J. M. C. 153.

(*c*) *Piper* v. *Piper*, [1902] P. 198; 71 L. J. P. 100.

(*d*) *Kershaw* v. *Kershaw*, 51 J. P. 646.

tion does not thereby cease, and if her husband afterwards refuse to take her back or maintain her, he may be guilty of desertion within the meaning of the Act (*e*). It would seem, too, that where a husband had already deserted his wife and they afterwards agreed by separation deed to live apart, but the wife did not condone her husband's past marital offences, and did not covenant not to sue him, she might be entitled to an order under the Act (*f*). Where the husband went abroad to obtain employment with his wife's consent, leaving her some provision, and offered to resume cohabitation on his return, this was held not to be desertion, and a protection order obtained without notice was set aside after the wife's death (*g*). Under section 4 the matrimonial offence of desertion would seem to be complete where the husband withdraws himself from cohabitation against the wife's will, though he continues to afford her maintenance. The desertion must be continuing at the time of the making of the order for separation and maintenance; and a *bona fide* offer on the part of the husband to return and provide for his wife would disentitle her to an order (*h*). A wife is (under the Divorce Acts) entitled to a decree for judicial separation if her husband petitions for a dissolution of marriage on the ground of her adultery and fails, and in the suit she prays for judicial separation on the ground of his desertion without a cause (*i*). The keeping apart of the spouses under a decree of judicial separation pronounced by the High Court is not desertion of the one by the other; and an order of judicial separation made under section 5 of the Act of 1895 prevents the injured party from relying on desertion in a petition in the High Court for dissolution of marriage (*k*). Desertion by the husband is a continuing offence, and a married woman is not barred from applying for an order under section 4 of this Act by the lapse of six months from the commencement of the desertion (*l*).

Habitual Drunkenness of Husband or Wife.—Under the Licensing Act, 1902 (*m*), where a husband is an habitual drunkard the wife may apply under the Summary Jurisdiction

(*e*) *Chudley* v. *Chudley*, 69 L. T. 617.
(*f*) See *Moore* v. *Moore*, 12 P. D. 193; 56 L. J. P. 104.
(*g*) *Mahoney* v. *McCarthy*, [1892] P. 21.
(*h*) See *Cargill* v. *Cargill*, 27 L. J. P. M. & A. 69.
(*i*) *Ibid.*
(*k*) *Harriman* v. *Harriman*, [1909] P. 123; 78 L. J. P. 62.
(*l*) *Heard* v. *Heard*, [1896] P. 188; 65 L. J. P. 111.
(*m*) 2 Edw. VII. c. 28, s. 5.

(Married Women) Act, 1895, for an order that she be no longer bound to cohabit with him, which order while in force has the effect in all respects of a decree of judicial separation on the ground of cruelty; and the husband is entitled to apply for a similar order as to his wife, and for this purpose the Act of 1895 is made to apply to the application of and order obtained by the husband (*n*).

For a definition of "habitual drunkard" the Licensing Act, 1902, refers to the Habitual Drunkards Act, 1879 (*o*), which defines the term as meaning a person who, not being amenable to any jurisdiction in lunacy, is notwithstanding, by reason of habitual intemperate drinking of intoxicating liquors, at times dangerous to himself or others, or incapable of managing himself or his or her affairs. The Summary Jurisdiction (Separation and Maintenance) Act, 1925 (*p*), adds to this definition, the habitual taking or using, except upon medical advice, of opium or other dangerous drugs within the meaning of the Dangerous Drugs Acts, 1920 and 1923. The earlier of these Acts in section 8 enumerates morphine, cocaine, heroin and their derivative salts and medicinal opium.

An order obtained by the husband may include a provision that the applicant be no longer bound to cohabit with his wife; a provision for the legal custody of the children; a provision that maintenance be paid for the wife not exceeding £2 per week, having regard to the means both of the applicant and his wife, and provision for payment of the costs by either husband or wife, or by both.

Cruelty to Children.—Under section 1, sub-section 3 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, an addition is made to the grounds upon which the husband may apply for an order, namely, that his wife has been guilty of persistent cruelty to his children.

Variation or Discharge of Orders.—Under the Act of 1895 the adultery of the wife will disentitle her to any order unless the husband has condoned, or connived at, or by his wilful neglect or misconduct conduced to, the adultery (*q*). A court of summary jurisdiction of the district in which any order under this Act has been made, or any order under the Matrimonial Causes Act,

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(*n*) 58 & 59 Vict. c. 39.
(*o*) 42 & 43 Vict. c. 19.
(*p*) 15 & 16 Geo. V., c. 51.
(*q*) 58 & 59 Vict. c. 39, s. 6.

1878, or the Married Women (Maintenance in Case of Desertion) Act, 1886, may, on the application of either the wife or husband, on satisfactory fresh evidence (*r*), at any time alter, vary, or discharge such order, and may increase or diminish the amount of any weekly payment, so that it does not exceed in any case £2 (*s*). Under the Act of 1895 (*t*) if any married woman, upon whose application an order has been made, shall commit an act of adultery, such order shall on proof thereof be discharged, but under the provisions of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, the Court may refuse to discharge the order if the act of adultery was conduced to by the failure of the husband to make such payments as in the opinion of the Court he was able to make under the order (*u*).

Where a married woman with respect to whom an order has been made resumes cohabitation after living apart from her husband, or where she has before October 1, 1925 (the commencement of the Act), resumed cohabitation, and is at that date cohabiting with him, the order shall cease to have effect on the resumption of cohabitation, or at the commencement of the Act, as the case may be (*x*).

Under the Married Women Maintenance Act, 1920 (*y*), an order made previously to the passing of the Act (*z*) may be varied on the application of the married woman so as to include from the date of the variation a provision for the children. Under the Summary Jurisdiction (Separation and Maintenance) Act, 1925, in the event of the order being discharged the Court may make a new order that the legal custody of the children shall continue to be committed to the wife, and for payment by the husband of maintenance not exceeding 10s. a week for each child until it attains the age of 16. The interests of the child are primarily to be considered in making such order (*a*).

The power of the justices to rehear a summons under the Act of 1886 at the instance of the husband was held to be

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(*r*) For what is fresh evidence, see note (*u*) on p. 240; *Johnson* v. *Johnson*, [1900] P. 19; 69 L. J. P. 13.
(*s*) 58 & 59 Vict. c. 39, s. 7.
(*t*) *Ibid.*
(*u*) 15 & 16 Geo. V. c. 51, s. 2, sub-s. 1.
(*x*) 15 & 16 Geo. V. c. 51, s. 2, sub-s. 2.
(*y*) 10 & 11 Geo. V. c. 63, s. 1, sub-s. 2.
(*z*) The Act was passed on December 23, 1920.
(*a*) 15 & 16 Geo. V. c. 51, s. 2, sub-s. 1 (b).

limited to an application on his part to show that his means had been altered in amount since the making of the original order for the purpose of varying the order (*b*). But under the Act of 1895 there does not appear to be any such limitation to the husband's right of application. If he suggests adultery at the original hearing and is offered an adjournment for the purpose of proving it but declines and allows the case to go on, he cannot afterwards apply for a rehearing on that ground (*c*).

A court of summary jurisdiction would now seem to possess the power of altering, varying, or discharging any such order which has been made by a Court of Quarter Sessions or by a judge of assize (*d*). The justices may refuse to make any such order, and leave the parties to go to the High Court if the matters in question between the parties could be more conveniently dealt with by the superior Court (*e*). But the High Court may direct the court of summary jurisdiction to rehear and determine the application (*f*). Appeals from the order or refusal to make an order by a court of summary jurisdiction under this Act lie to the Probate, Divorce, and Admiralty Division of the High Court (*g*).

Restitution of Conjugal Rights.—A decree for restitution is no longer enforceable by attachment (*h*); but, by the Matrimonial Causes Act, 1884 (*i*), it was provided that failure to comply with the decree shall be deemed desertion without reasonable cause, entitling the petitioner to bring a suit for judicial separation (*k*). The offence of statutory desertion constituted by this Act coupled with adultery by the husband, enabled the wife to petition for dissolution of the marriage without waiting for the expiration of two years' desertion (*l*); but the importance of the Act is lessened since the Act of 1923 enabled a wife to obtain a divorce on the ground of adultery alone committed after

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(*b*) *Sephton* v. *Sephton*, 58 L. T. 281.
(*c*) *Reg.* v. *Justices of Oldham*, 51 J. P. 647.
(*d*) Summary Jurisdiction (Married Women) Act, 1895, s. 7.
(*e*) Summary Jurisdiction (Married Women) Act, 1895, s. 10.
(*f*) 2 Edw. VII. c. 28, s. 10.
(*g*) Summary Jurisdiction (Married Women) Act, 1895, s. 11.
(*h*) S. C. J. Act, 1925, s. 187.
(*i*) 47 & 48 Vict. c. 68.
(*k*) Sect. 5. Service of the citation and petition in a suit for restitution may be served upon the respondent though residing out of the jurisdiction, in which case a reasonable time for appearance must be given. *Bateman* v. *Bateman*, [1901] P. 136; 70 L. J. P. 29; *Hardie* v. *Hardie*, 70 L. J. P. 29.
(*l*) *Harding* v. *Harding*, 11 P. D. 111; 55 L. J. P. 59; *Dicks* v. *Dicks*, [1899] P. 275; 68 L. J. P. 118.

the passing of the Act. Conduct on the part of one of the spouses which may not amount to legal cruelty (such as making criminal charges against her husband) entitling him to a judicial separation may, on the other hand, disentitle her to a decree for restitution of conjugal rights (*m*). If one spouse has a reasonable cause (as, for instance, inability to agree with her step-children) for leaving the other, who afterwards refuses to cohabit, such leaving is not desertion disentitling the spouse who left the matrimonial domicil from maintaining a suit for restitution of conjugal rights (*n*). The wife must be sincere in her desire for restitution (*o*), though a desire to obtain maintenance on non-compliance does not show a lack of *bona fides* (*p*). The Court has power to order the husband to make his wife periodical payments in the nature of alimony, enforceable in the same manner as in proceedings for judicial separation (*q*); and where the wife refuses to comply with an order the husband may obtain a decree for judicial separation, and the Court may order a settlement to be made of her property for the benefit of the husband and children, or either of them; and the Court in ordering a settlement of the property of one party for the benefit of the other may in its discretion take into account the general conduct of the parties (*r*); but the Court in making a settlement out of the wife's property has no power to order a settlement of her property which is subject to a restraint against anticipation (*s*).

The Court has power before or after final decree to make orders as to custody, maintenance, and education of the children, as though the proceedings were for judicial separation (*t*); and can make such orders at the time of pronouncing a decree for restitution of conjugal rights (*u*).

Right of Divorced Woman to Retain Her Married Name.—There seems to be some doubt prevailing on the question whether a married woman on dissolution of her marriage is entitled to retain the name of her husband, with the description of "Mrs."

(*m*) *Russell* v. *Russell*, [1895] P. 315; 64 L. J. P. 105.
(*n*) *Oldroyd* v. *Oldroyd*, [1896] P. 175; 65 L. J. P. 113. This point was debated but not decided by the House of Lords in *Russell* v. *Russell*, [1897] A. C. 395; 66 L. J. P. 122.
(*o*) *Harnett* v. *Harnett*, [1924] P. 126; 93 L. J. P. 49.
(*p*) *Palmer* v. *Palmer*, [1923] P. 180; 92 L. J. P. 129.
(*q*) S. C. J. Act, 1925, s. 187.
(*r*) S. C. J. Act, 1925, s. 190; *Swift* v. *Swift*, [1891] P. 129; 60 L. J. P. 14.
(*s*) *Michell* v. *Michell*, [1891] P. 208; 60 L. J. P. 46.
(*t*) Sect. 6.
(*u*) See *Paine* v. *Paine*, 50 W. R. 382.

before it. It has been held (*y*) that she is entitled to retain it; and on this ground, that marriage confers a name upon a woman which becomes her actual name, and she can only obtain another by reputation. There is no power in the Courts to compel her to take another name, even if she has been divorced by reason of her misconduct; a choice of names by which to be known is free and unlimited to all persons (save for purposes of fraud); and she can neither be compelled to take another name, nor to give up that name which she has lawfully acquired by the fact of marriage. From this it follows, that a woman on dissolution of her marriage may continue to style herself by her married name, or may revert to her maiden name, or may seek by reputation to gain an altogether new name.

This view is supported by the case of *Cowley* v. *Cowley* (*z*), in which a husband, a peer of the realm, sought to restrain by injunction his late wife, who had divorced him, from continuing to use his name, though she had since married a commoner. This case strongly supports the proposition in the text, for it was admitted that after marrying a commoner the Countess of Cowley had no legal right to the user of that name; yet her act in retaining her former married name did not amount to a legal wrong against her former husband, or so affect the enjoyment of the incorporeal hereditament he possessed in his title as to entitle him, in the absence of malice (*a*), to an injunction to restrain her use of the title (*b*).

A dignity obtained by a woman through marriage remains hers though her husband die, and she remains noble for life. This privilege remains hers even though she marry again; provided her second husband is of noble birth; thus if a woman marry a duke who dies, and she is married afterwards to a man of noble birth, she continues a duchess (*c*). But if she has acquired her dignity by marriage, and afterwards marries a commoner, that is, one who is not noble, then she loses her dignity, and all the rights and privileges annexed to it (*d*).

(*y*) *Fendall* v. *Goldsmith*, 2 P. D. 263; 40 L. J. P. 70.

(*z*) In the Court of Appeal, [1900] P. 305; 69 L. J. P. 121; in the House of Lords, [1901] A. C. 450; 70 L. J. P. 73.

(*a*) See Jactitation of Marriage, *ante*, p. 464.

(*b*) Indeed, in the House of Lords it was determined that if such user amounted to a question affecting a dignity, it could only be disposed of by that House, sitting as a Committee of Privileges.

(*c*) Co. Litt. 16 *b*; Com. Dig. Dignity (*c* 6).

(*d*) *Ibid.*; *Countess of Rutland's Case*, 6 Co. Rep. 360; *Howard* v. *Duke of Suffolk*, 1 Dyer, 79 *b*; *Cowley* v. *Cowley* (*ubi sup.*).

CHAPTER XVI.

INTERNATIONAL VALIDITY OF MARRIAGE AND DIVORCE.

It would seem almost out of place to introduce into a work of this description a chapter which deals with international law; but when it is remembered how easy is modern intercourse between members of different nationalities, how liable they are to be affected by such intercommunion, how the laws dealing with the same subjects in various countries differ and conflict, and how knowledge of discrepancies may tend to remove them, then the importance of these considerations is a sufficient reason for their discussion.

Though this chapter will deal with matrimonial questions from an international aspect, it will not deal with mere abstract propositions, but practically discuss the international validity of marriage and divorce.

Section 1.

Marriage.

It would be impossible to treat of this question without first inquiring shortly into the nature of the most important factor which regulates the position of the spouses to each other, both as regards the inception, maintenance, and dissolution of the marriage tie, namely, domicil. The parties must have a domicil somewhere or another, and it often becomes necessary to inquire by the laws of what place the true position of the parties to each other in the multifarious relations of married life is to be regulated and governed. It is obvious that domicil must be an essential consideration in treating of the international aspect of marriage.

Domicil. Definition.—Domicil has never been satisfactorily defined, and it may be that, owing to the complexity of ideas involved in it, it never will be. It is an amalgamation or combination of the fact of residence and an *animus* or intention of remaining for an indefinite or unlimited time in a particular

place; and unless both these elements are present there is no domicil in the legal and technical sense, though the particular residence of the individual might popularly and accurately enough be described as his "home." The residence in the chosen place must be based upon the intention to remain there for an indefinite period (*a*). Added to these two ideas there is a possible third—an *animus relinquendi*, or intention to abandon a former domicil, whether of origin or of choice. Domicil is established not by naked assertion but by deeds and acts (*b*). It will suffice to give a few of the leading definitions of this subject, which more or less include the above constituents essential to an accurate description of the idea.

Story (*c*) defines domicil as "that place in which a person's habitation is fixed, without any present intention of removing therefrom."

Phillimore (*d*): "A residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time."

Vice-Chancellor Kindersley (*e*): "That place is properly the domicil of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or uncertain) shall occur to induce him to adopt some other permanent home."

Dicey (*f*): "The place or country either (i) in which a person in fact resides with the intention of residence; or (ii) in which having so resided he continues actually to reside, though no longer retaining the intention of residence (*animus manendi*); or (iii) with regard to which, having so resided there, he retains the intention of residence (*animus manendi*), though in fact he no longer resides there."

Strictly speaking, there are but two kinds of domicil: (1) domicil of choice; (2) domicil not of choice, which includes

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(*a*) *Udny* v. *Udny*, L. R. 1 Sc. App. 441. "Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time." Per Lord Westbury, p. 458.

(*b*) Per Sir B. Peacock in *McMullen* v. *Wadsworth*, 14 App. Cas. 631; 59 L. J. P. C. 7.

(*c*) Conflict of Laws, s. 41.

(*d*) Law of Domicil, 13.

(*e*) In *Lord* v. *Colvin*, 28 L. J. Ch. 361, 366.

(*f*) Law of Domicil, 44.

(a) birth domicil (*domicilium originis*), and (b) domicil by operation of law.

Domicil of Choice.—It is to the domicil of choice, or that acquired *proprio marte*, that the above definitions and remarks apply. The domicil of birth (*domicilium originis*) is imposed upon a person who has not acquired another for the purpose of assigning him some law by which his personal status or property shall be governed. This domicil easily reverts, and the presumption of law is against the intention to abandon it (*g*). But in order to lose the domicil of choice and revive the domicil of origin, it is not sufficient for the person to form the intention of leaving the domicil of choice but he must actually leave it with the intention of leaving it permanently (*h*).

By Operation of Law.—The domicil by operation of law is imposed on those who are not *sui juris*, but are dependent upon others—thus a wife takes the domicil of her husband; a legitimate infant (*i*), born in the father's lifetime, that of his father; a posthumous (*k*), or an illegitimate (*l*) infant, that of his mother. Domicil, whether of birth or of choice, must be gathered from a person's surroundings, and is to be ascertained either by presumptions of law, or by the known facts of the case, which must be tested by the ordinary rules of evidence. The actual residence in any one place is a physical fact of easy proof, but the difficulty arises in balancing nicely conflicting points of evidence adduced to show that the *animus manendi* was directed to one spot in preference to another; or, in other words, that the *animus relinquendi* was or was not complete as to a particular place (*m*). Domicil may be proved by the statements of a person (*n*), by his acts (*o*), and by the presumption that a domicil once obtained continues (*p*), and that it is there where a man's wife and family are (*q*).

Domicil of Husband.—The true seat of the matrimonial relations is undoubtedly the domicil of the husband, because it

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(*g*) *Bempde* v. *Johnstone*, 3 Ves. 198; *Hodgson* v. *De Beauchesne*, 12 Moo. P. C. 285.

(*h*) *Re Marrett, Chalmers* v. *Wingfield*, 36 Ch. D. 400. See *Bell* v. *Kennedy*, L. R. 1 H. L. (Sc.) 307; *Re Patience, Patience* v. *Main*, 29 Ch. D. 976; 54 L. J. Ch. 897.

(*i*) *Udny* v. *Udny* (*ubi sup.*).

(*k*) Westlake, Priv. Int. Law, s. 35 (1st edit.). *The Venus*, 8 Cr. 253.

(*l*) *Re Wright's Trusts*, 2 Jur. (N.S.) 465; 25 L. J. Ch. 621.

(*m*) *Re Stern*, 28 L. J. Ex. 22.

(*n*) *Brodie* v. *Brodie*, 30 L. J. P. M. & A. 185.

(*o*) *Doucet* v. *Geoghegan*, 9 Ch. D. 441.

(*p*) *Crookenden* v. *Fuller*, 1 Sw. & Tr. 441.

(*q*) *Platt* v. *Att.-Gen.*, 3 App. Cas. 336.

is the place of the performance of the duties arising from the marriage (*r*). It is to the abode of the husband that both parties look when entering into this contract; and both may be taken to be willing to bring themselves under the laws and customs which there obtain (*s*). By the laws of all civilized nations the husband takes the lead in married life, and to his rule the wife and the family are subjected; he has the power to alter his place of residence, and make choice of the spot where their fixed abode shall be. As a necessary consequence of this, if the husband should change his domicil during coverture, that of the wife will change also (*t*); and the conjugal rights as to movable property will vary, though as to immovable or real property the *lex situs* prevails. A widow retains her husband's last domicil until she acquires a new one for herself.

Law Governing Marriage Contract.—There are two laws which can govern a matrimonial contract; one, that of the domicil of the parties; the other, that of the place in which the marriage is celebrated.

There is good authority for saying that formerly the theory of the English law on this point was, that a marriage valid by the *lex loci contractus*, or *celebrationis*, was valid everywhere (*u*), unless there was a positive enactment binding on the English Courts and preventing them from recognizing certain marriages as good and valid. According to a modern decision (*x*), the principle is as follows: The *lex loci celebrationis* is to govern and decide all questions relating to the validity of the ceremony by which the marriage is constituted. The *lex domicilii*, on the other hand, is to decide the question of the capacity of the parties for contracting a valid marriage (*y*); with this result, that if both parties are domiciled in a country the laws of which prevent their marrying, and though validly married according to the *lex loci celebrationis*, both as regards forms and capacity, then their marriage is to be null and void. "Upon this point of principle, how does the matter stand? Let it be granted (and I think it is well settled) that the general rule inter-

(*r*) Savigny, Priv. Int. Law, § 379, pp. 240, 241.

(*s*) See *De Necols* v. *Curlier*, [1900] A. C. 21; 69 L. J. Ch. 109, 680.

(*t*) *Warrender* v. *Warrender*, 2 Cl. & F. 488; *Re Daly's Settlements*, 25 Beav. 456; 27 L. J. Ch. 751; *Yelverton* v. *Yelverton*, 29 L. J. P. M. & A. 34.

(*u*) *Scrimshire* v. *Scrimshire*, 2 Hag. Con. R. 395; *Simonin* v. *Maillac*, 2 Sw. & Tr. 67; 29 L. J. P. M. & A. 97.

(*x*) *Sottomayor* v. *De Barros*, 3 P. D. 1; 5 P. D. 94; 49 L. J. P. D. & A. 1; explained in *Ogden* v. *Ogden*, [1908] P. 46; 77 L. J. P. 34.

(*y*) See also *Re Bozzelli's Settlement*, *Husey-Hunt* v. *Bozzelli*, [1902] 1 Ch. 751; 71 L. J. Ch. 505.

nationally recognized as to the constitution of marriage is that when there is no personal incapacity attaching upon either party, or upon the particular party who is to be regarded, by the law to which he is personally subject, that is, the law of his own country, then marriage is held to be constituted everywhere, if it is well constituted *secundum legem loci contractus*. But that merely determines what in all these cases is the point you start from. When a marriage has been duly solemnized according to the law of the place of solemnization, the parties become husband and wife" (*z*). But where the wife is a domiciled English subject, then the above rule may possibly not be strictly applied (*a*).

The case in which both parties are foreigners, who have been married in England, and one of them is domiciled in a country the laws of which permit of their intermarrying, and the other is domiciled in a country the laws of which render them incapacitated from intermarrying, does not seem to be provided for (*b*). Which law, that of the domicil or that of the place of celebration, do the principles of international jurisprudence require should prevail and govern the contract? Clearly the *lex loci celebrationis*. That a marriage valid by the law of the place where it is celebrated ought to be valid everywhere is an axiom of international law. Marriage may truly be said to be a matter *juris gentium* from its universality, for every civilized nation recognizes the institution, and the status created by it; and when properly constituted marriage ought to be universally recognized. This is the undoubted view held by the American jurists (*c*); and is the earlier and sounder view of the English Courts. The English law regarded the *lex loci celebrationis* as governing the marriage if celebrated in conformity with its provisions, and this even where the parties had recourse to a

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(*z*) Per Selborne, L.C., in *Harvey* v. *Farnie*, 8 App. Cas. 43, 50; 52 L. J. P. D. & A. 33.

(*a*) *Sottomayor* v. *De Barros*, 3 P. D. 1, *sed quære*; 5 P. D. 94; 49 L. J. P. D. & A. 1.

(*b*) *Ibid.* Take the case of a domiciled American subject and a domiciled Portuguese subject, properly intermarrying in London according to the laws of England; they are first cousins. By his State law he may marry his first cousin; by the law of Portugal a Portuguese subject may not marry a first cousin without first obtaining the Papal dispensation; this dispensation is not obtained. The validity of this marriage is litigated in the English Courts; to the law of which party must the English Courts pay deference? See remarks of Cresswell, J., in *Simonin* v. *Maillac*, 29 L. J. P. M. & A. 97.

(*c*) Kent, Commentaries, ss. 454, 458; Story, Conf. of Laws, ss. 75, 76; Bish. Mar. and Div. s. 355.

foreign country to avoid disabilities in their own (*d*). Another reason for preferring the law of the place of celebration rather than that of the domicil is, that it may frequently be most difficult to ascertain or determine a person's domicil. A third is the difficulty of being able to give effect to the validity of a contract if the capacity of a contracting party depended upon the law of his domicil (*e*). A fourth reason is, that though an independent State may impose restrictions upon its citizens (*f*) either within or without its own territories, it has no right to call upon another independent State to give effect to such restrictions, which would amount to a virtual surrender of its independence and supremacy within its own borders (*g*). "A contract, valid by law of the place where it is made is, generally speaking, valid everywhere *jure gentium* and by tacit assent. The *lex loci contractus* controls the nature, construction, and validity of the contract; and on this broad foundation the law of contracts, founded on necessity and commercial convenience, is said to have been generally established. If the rule were otherwise, the citizens of one country could not safely contract or carry on commerce in the territories of another. The necessary intercourse of mankind requires that the acts of parties, valid where made, shall be recognized in other countries, provided they be not contrary to good morals, nor repugnant to the policy and positive institutions of the State" (*h*). This rule exists not out of mere international courtesy, but is founded *ex debito justitiæ* upon the acts and intentions of the parties. The policy of the law ought to be and is in favour of marriage, and the principles of convenience and propriety affect in a marked degree the status of marriage and the results flowing therefrom. Upon this assumption the English Courts have hitherto acted, and held that a marriage valid by the law of the place where it was

(*d*) *Compton* v. *Bearcroft*, 2 Hag. Con. Rep. 443 *n*. See also *Steele* v. *Braddell*, Milw. Ir. Eccl. Rep. 1.

(*e*) For the curious, if not serious, anomalies which might result from enforcing the claims of the *lex domicilii*, see Bish. Mar. and Div. s. 359.

(*f*) As the Code Napoléon does in Article 170: "Le Mariage contracté en pays étranger entre français, et entre français et étrangers, sera valable, s'il a été célébré dans les formes usitées dans le pays, pourvu qu'il ait été précédé des publications prescrites par l'article 63, au titre des Actes de l'état civil, et que le français n'ait point contrevenu aux dispositions contenues au chapitre précédent." This is the provision which enables so many Frenchmen marrying abroad to get rid of their foreign wives, by obtaining a decree of nullity on the ground that they have not complied with the statutory requirements of their *lex domicilii*.

(*g*) Cresswell, J., in *Simonin* v. *Maillac* (*ubi sup.*).

(*h*) Kent, Commentaries, s. 454; 1 Burge, For. and Col. Law, 129. See the English cases, *Male* v. *Roberts*, 3 Esp. 163; *Dalrymple* v. *Dalrymple*, 2 Hag. Con. Rep. 54: and the leading American case, *Saul* v. *His Creditors*, 5 Martin (N.S.) [La.] 569.

celebrated was a good and valid marriage in England (*i*). At any rate, the earlier decisions did not in the conflict between the *lex loci* and the *lex domicilii* make any distinction between the *capacity* of the parties to contract and the *forms* of the ceremony to be observed (*k*).

There are, however, exceptions and qualifications to the above rule, for any independent State may refuse to accept as valid within its territory certain marriages which might be valid in all respects in the place where they were celebrated (*l*), and the Courts of such State would be compelled to refuse them recognition whenever they were debated before them, and these exceptions do not necessarily strike at the soundness of the rule. No State, for instance, ought to be compelled, if it were possible, to countenance a marriage which is declared to be incestuous by the universal voice of Christendom (*m*); or to recognize a marriage which is polygamous (*n*). Again, if a State elects to say that its domiciled citizens shall under certain circumstances be incapacitated from contracting a valid marriage, and its citizens so incapacitated from intermarrying cross over its borders and marry in a neighbouring State which allows them to marry, and on return to their domicil their marriage is called in question, the Courts must pronounce against its validity (*o*). The very furthest limit to which any country should consent to extend by recognition the disabilities by their *lex domicilii* of parties who are present in that country and are desirous of intermarrying, is an unconditional prohibition which cannot be removed by any act of the parties. This even is asking too much of the law of the country in which the parties happen to be residing. Where the prohibition of the *lex domicilii* is penal in its nature and operation, such prohibition ought not to have any ex-territorial force; and if the marriage is otherwise valid by the *lex loci contractus*, such marriage should be valid

(*i*) *Dalrymple* v. *Dalrymple* (*ubi sup.*); *Scrimshire* v. *Scrimshire*, 2 Hag. Con. Rep. 395; *Herbert* v. *Herbert*, 2 Hag. Con. Rep. 263; *Lacon* v. *Higgins*, 3 Stark. 178; *Ryan* v. *Ryan*, 2 Phil. Eccl. 332. The validity of the Gretna Green marriages has been upheld in a petition under the Legitimacy Declaration Act, 1857; *Gardner* v. *Att.-Gen.*, 60 L. T. 839. The American Courts have acted upon the same principle (Story, Conf. of Laws, s. 79).

(*k*) *Dalrymple* v. *Dalrymple*, 2 Hag. Con. Rep. 54; but see *Brook* v. *Brook*, 9 H. L. Cas. 193.

(*l*) Such as marriages which infringe the provisions of the Royal Marriage Act, 12 Geo. III. c. 11. *Sussex Peerage Case*, 11 Cl. & F. 85.

(*m*) See *Re Bozzelli's Settlement*, *Husey-Hunt* v. *Bozzelli*, [1902] 1 Ch. 751; 71 L. J. Ch. 505.

(*n*) *Hyde* v. *Hyde and Woodmansee*, L. R. 1 P. & D. 130; 35 L. J. P. & M. 57; Story, Conf. of Laws, s. 113 *a*.

(*o*) *Brook* v. *Brook* (*ubi sup.*); *Mette* v. *Mette*, 28 L. J. P. M. & A. 117.

everywhere. Thus, by the law of the State of New York, one of a divorced couple cannot marry during the lifetime of the other, and if he or she do contract a marriage, the other living, a particular punishment is provided for such offence. Should, however, one of the divorced parties come over to England, or go to a neighbouring State where such prohibition does not exist, and contract a marriage, such marriage is valid not only in the place where it is celebrated, but also in the State of New York itself (*p*).

The modern theory of English law on this subject is thus summed up in Mr. Dicey's valuable work on Domicil (*q*):—

"A marriage is valid when each of the parties has, according to the law of his or her respective domicil, the capacity to marry the other, and if the marriage is celebrated in accordance with any form recognized as valid by the law of the country where the marriage is celebrated."

The converse proposition, that marriages not conforming to the requirements of the place of celebration in the matter of form and ceremonies are invalid, does not hold good in certain cases, where—(i) "the parties enjoy the privilege of exterritoriality, and the marriage is celebrated in accordance with any form recognized as valid by the law of the State to which they belong, or (ii) the marriage (being between British subjects?) is celebrated in accordance with the requirements of the English common law in a country where the use of the local form is impossible; or (iii) the marriage is celebrated in a country not being part of the British dominions, in accordance with the provisions of, and the forms required by, 4 Geo. IV. c. 91, 12 & 13 Vict. c. 68, or any other statute applicable to the case" (*r*).

Thus, the capacity of the parties is judged of by the *lex domicilii*, and the validity of the forms and ceremonies by the *lex loci celebrationis*, and the consent of parents or others are to be deemed part of the ceremony (*s*). If the ceremonies of the *locus celebrationis* are strictly followed, the validity of the marriage is in no way affected by the parties having gone there to avoid the requirements of the law of their domicil as to consents of proper parties, publicity, or the like, or that no

(*p*) *Ponsford* v. *Johnson*, 2 Blatch. 51; Dicey, Dom. 223, 224.
(*q*) Pp. 200, 201.
(*r*) *Ibid.*
(*s*) *Sottomayor* v. *De Barros*, 3 P. D. 1; 5 P. D. 94; 49 L. J. P. D. & A. 1. For very full remarks on this case see the first edition of this work, pp. 494-498.

regular ceremony is required by the law of the country where the marriage takes place (*t*). It thus seems to be the law that where two persons not under any disability by their *lex domicilii*, contract a marriage in a country where they would be incapacitated from intermarrying, such marriage is valid (*u*). This incapacity by the *lex domicilii* applies equally to marriages of domiciled English subjects marrying abroad, and domiciled foreign subjects marrying in England (*x*). The English Court of Divorce has recognized the validity of a divorce by the Court of the *lex loci celebrationis* of the marriage, though by the *lex domicilii* of the parties their marriage was indissoluble. In this case neither of the parties to the marriage was a domiciled English subject (*y*).

The converse of the proposition that a marriage valid by the law of the place of celebration is valid everywhere, namely, that a marriage invalid by the law of the place of celebration is invalid everywhere, is equally true. But to this proposition there are exceptions, and these are demanded by the necessity of the case, for otherwise parties who were in foreign countries, whether transiently or in permanent residence, and who were utterly unable to conform to the requirements of the local law, could never contract a valid marriage at all, though no obstacle (other than the impossibility of conforming to the local law) intervened. These exceptions are really based upon only one ground or factor, namely, an insuperable incapacity to conform to the *lex loci*. They have been thus classified (*z*):—

(1) If the parties are sojourning in a foreign country and under the local law there is no way by which they can enter into valid marriage, they may marry in their own forms, and it will be recognized at home as good. The basis of this exception is the practical impossibility of conforming to the laws of the country in which the parties are commorant, such as by reason of the impediment of religion; thus, where two Protestants are in a Roman Catholic country in which they could not be married according to the *lex loci* without abjuring or mocking their own religious faith (*a*). The obstacle to the marrying by the local law must be practically insuperable, and no mere temporary

(*t*) *Dalrymple* v. *Dalrymple* (*ubi sup.*); *Swift* v. *Kelly*, 3 Knapp, 257.
(*u*) *Sottomayor* v. *De Barros* (*ubi sup.*).
(*x*) Dicey, Dom. 218. *Mette* v. *Mette* (*ubi sup.*); *Brook* v. *Brook* (*ubi sup.*).
(*y*) *Ingham* (f. c. *Sachs*) v. *Sachs*, 56 L. T. 920.
(*z*) 1 Bish. Mar. & Div. ss. 392-400.
(*a*) *Lord Cloncurry's Case*, Cr. Dig. 276; and see *Sussex Peerage Case*, 11 Cl. & F. 152.

obstruction which by the lapse of a short time or by making slight concessions could be overcome (*b*). Foreigners would not be bound to conform in a country the *lex loci* of which fixed the age of majority at some comparatively late period of life, *e.g.*, thirty or forty years, and required the consent of parents up to that age. There may be another exception added to the foregoing, viz., the provisions of an Act of Parliament that the marriage of a British subject abroad shall be valid if celebrated in a particular manner, though by the *lex loci* such marriage is invalid for want of form (*c*). But such exception would now have but little effect given to it (*d*).

(2) If in the place of celebration there is a special law, differing from the general, permitting foreigners to marry in a way peculiar to themselves, and making their marriages good, they may avail themselves of it, and their marriages, if not contrary to the law of their domicil, will be valid also at home. That is, where a country recognizes the marriage laws and rites of a definite set of persons who have rites differing from those recognized by the country at large, as in England Jews (*e*); persons who are married according to special and not general rites of that country will be deemed to be validly married. "There is a *jus gentium* upon this matter—a comity which treats with tenderness, or at least with toleration, the opinions and usages of a distinct people in this transaction of marriage. It may be difficult to say *a priori* how far the general law should circumscribe its own authority in this matter; but practice has established the principle in several instances, and where the practice is admitted, it is entitled to acceptance and respect. It has sanctioned the marriages of foreign subjects in the houses of the ambassadors of the foreign country to which they belong. I am not aware of any judicial recognition upon the point; but the reputation which the validity of such marriages has acquired makes such a recognition by no means improbable, if such a question was brought to judgment" (*f*).

(3) An invading army carries with it the law of the country to which it belongs (including the matrimonial law); and if, while hostilities are progressing, a marriage is celebrated within

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(*b*) *Kent* v. *Burgess*, 11 Sim. 361.

(*c*) See *Hay* v. *Northcote*, [1900] 2 Ch. 262; 69 L. J. Ch. 586.

(*d*) Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23, s. 2; and Regulation No. 4 under the Act).

(*e*) *Lindo* v. *Belisario*, 1 Hag. Con. Rep. 216; *Goldsmid* v. *Bromer*, 1 Hag. Con. Rep. 324.

(*f*) Per Lord Stowell in *Ruding* v. *Smith*, 2 Hag. Con. Rep. 371, 384.

its lines, it need not conform to the law of the invaded country. Thus, where two British subjects were married by an army chaplain under a licence from the Commander-in-chief, within the lines of the British army which had invaded a Dutch province that had surrendered, but had not been ceded to the British crown, and was awaiting a treaty of peace, their marriage was held good (*g*).

Section 2.

Divorce.

Divorce must be regarded from a different standpoint to marriage, because while the status of marriage is universally recognized throughout the civilized world, divorce meets with only a partial recognition, and is therefore more in the nature of a local institution. Divorce is also not an incident of the marriage contract to be governed by the *lex loci contractus*, but is an incident of status to be disposed of by the law of the domicil of the parties, namely, that of the husband (*h*). It is now well established, at any rate in most countries where divorce is permitted, that competent tribunals have jurisdiction to put an end to a contract of marriage which was not originally made within their jurisdiction. The circumstances which form the grounds for divorce are such as are likely to cause scandal and offence in the society shared by the guilty husband or wife; and the protection of its own subjects constitutes an ample reason for a State to assume jurisdiction over those who offend against its laws or good morals. Thus, the distinction has been made between marriage and divorce; for marriage is a thing *juris gentium*, and of universal recognition, and if valid by the *lex loci celebrationis* should be held valid in all countries, for this is most conducive to the interests of the contracting parties. Divorce, on the contrary, is not of general prevalence, and where permitted, is deemed either a *quasi* punishment for offences against the moral law, or as a means to prevent grave abuses and scandals, and these should be settled by the *lex domicilii*, for these concern only the society in which the parties have taken up their permanent abode and residence.

(*g*) *Ruding* v. *Smith* (*ubi sup.*). That the matrimonial law is included, see *Lautour* v. *Teasdale*, 8 Taunt. 830; *Rex* v. *Brampton*, 10 East, 282; *Catterall* v. *Catterall*, 1 Rob. Eccl. 580.

(*h*) *Harvey* v. *Farnie*, 8 A. C. 43; 52 L. J. P. 33.

Where the suit is for a decree of nullity of marriage the test of the jurisdiction of the Court is not the domicil of the parties, that is, of the husband, because the question litigated is the validity or invalidity of the marriage; and if the marriage is annulled the pretended wife never had a husband whose domicil she could take (*i*). But matrimonial residence within the jurisdiction is sufficient to entitle the Court to pronounce a decree of nullity (*k*).

In discussing how far a divorce decreed in one State will receive recognition in another, Mr. Justice Story observes (*l*): "Other most perplexing inquiries may grow out of the consideration of the national character of the parties; whether they are both citizens or subjects, or both foreigners, or one a citizen and the other a foreigner; whether the marriage is celebrated at home or celebrated abroad; whether the jurisdiction of any Court to pronounce a decree of divorce is founded on the national character of the parties, or upon the celebration of the marriage within the territorial jurisdiction, or upon the domicil of the parties within it, or upon the actual presence or temporary residence of one or both of them at the time when the process for divorce is instituted. And if, upon any of these grounds, the jurisdiction is sustained, another not less important inquiry is, whether the law of divorce of the place of the marriage, or that of the place where the suit is instituted, is to be administered by the Court before which the suit is pending."

Recognition of Foreign Divorces by English Courts.—It is proposed here only to consider how far the English Courts will recognize the validity of foreign divorces, in other words, how far they will recognize the validity of sentences of dissolution by foreign tribunals of marriages contracted in England, or by English subjects domiciled in other countries.

The English Courts were formerly inclined to hold fully the contractual theory of marriage, and that the right to divorce depended upon whether the *lex loci celebrationis* permitted or refused divorce to the parties. The question whether or not an English marriage was indissoluble before the passing of the Divorce Act, 1857, has ranged the authorities on either side, but later decisions and the text-writers on the subject generally hold that a foreign Court of competent jurisdiction is enabled

(*i*) See *Niboyet* v. *Niboyet*, 4 P. D. 1; 48 L. J. P. 1.
(*k*) *Roberts* (f. c. *Brennan*) v. *Brennan*, [1902] P. 143; 71 L. J. P. 74.
(*l*) Conf. Laws, s. 204.

under certain circumstances to pronounce a dissolution of a marriage celebrated in England between an Englishwoman and a domiciled native in the country where such Court has jurisdiction. The English Court of Divorce claims under the Divorce Act jurisdiction over and a right to dissolve a marriage celebrated abroad between foreigners, if they bring themselves within its jurisdiction by acquiring an English domicil (*m*). The English Courts ought to act (and do act) reciprocally, and attach the like credit to a dissolution of an English marriage by a foreign Court, as they would demand for a dissolution effected by them of the marriage of non-English persons over whom they might claim to exercise such jurisdiction. The effect of a foreign divorce on an "English marriage," or a marriage celebrated in England, is in no way hampered in the English Courts by questions of the allegiance or nationality of the parties (*n*), or whether or not the *delictum* forming the ground for divorce was committed within the jurisdiction of the *forum* pronouncing the dissolution.

So far as the English Courts are concerned there are two important questions involved:—

(1) Can a marriage celebrated in England between two persons domiciled in a foreign country, or between a man domiciled in a foreign country and a domiciled Englishwoman, be put an end to by a decree of a Court of competent jurisdiction in their own country, for causes sufficient or insufficient by the law of England?

(2) Can an "English marriage," that is, one celebrated between domiciled English subjects who afterwards *bona fide* change their domicil, be dissolved by a decree of a Court of competent jurisdiction in the country of their new domicil, for causes sufficient or insufficient by the law of England?

Marriage in England between Domiciled Foreigners, Dissolved by Court of Husband's Domicil.—As regards the first question there is no doubt that formerly, when there were few facilities for providing divorce, and it was maintained that an English marriage was indissoluble, the Courts were inclined to include in the phrase "English marriage" any and every marriage celebrated in England, though the contracting parties

(*m*) *Wilson* v. *Wilson*, L. R. 2 P. & D. 435.

(*n*) It is otherwise with French and Italian subjects, for their personal capacity does not depend upon domicil, but upon allegiance, and divorce is not recognized in Italy. Dicey, Dom. 238. Divorce, however, has been legalized in France.

were not domiciled in the country at the time of contracting the marriage tie. This question was involved in some of the most serious conflicts between the English and Scottish Courts. The Scottish Courts claimed to dissolve marriages of persons *resident* in Scotland, and originally a formal residence of forty days sufficed to found jurisdiction but since the case of *Pitt* v. *Pitt* (*o*), this claim can hardly be maintained (*p*). The English Courts strenuously resisted the right of the Scottish or other foreign Courts to dissolve marriages contracted, at any rate, between parties who retained their English domicil. An "English marriage" is now construed to mean a marriage celebrated between parties of whom the husband has an English domicil; thus, a marriage celebrated abroad between a domiciled Englishman and a foreigner would be "English"; while, on the contrary, a marriage in England between a foreigner domiciled abroad and a domiciled Englishwoman is a foreign marriage.

Domicil of the parties is the test applied by the English Courts of the jurisdiction of foreign Courts to pronounce a dissolution of a marriage celebrated in England or out of England. The question under discussion has been answered in the affirmative by the House of Lords in the case of *Harvey* v. *Farnie* (*q*) (upholding the decisions of the Court of Appeal, and of Sir James Hannen). That supreme tribunal held that the English Courts will recognize as valid the decision of a competent foreign tribunal dissolving a marriage which had been celebrated in England between a domiciled native in the country where such tribunal has jurisdiction and an Englishwoman, where the decision is not impeached by any kind of collusion or fraud, even though the cause dissolving the marriage was not sufficient to found a divorce in England. The facts of the case were shortly as follows: A., a domiciled Scotsman, married in England B., a domiciled Englishwoman. After marriage they resided in Scotland, and while there B. obtained a decree of dissolution of the marriage from the Scottish Court, on the ground of A.'s adultery alone. A., during the life of B., married C. in England. C., desiring to have her marriage with A. dissolved, and hearing of his former marriage and divorce in Scotland, presented a

(*o*) *Pitt* v. *Pitt*, 4 Macq. H. L. Cas. 627.

(*p*) But see Fraser H. & W. 1280 *et seq.* The answer to his lordship's reason for holding that jurisdiction in divorce may be constituted by residence without domicil, is that the Scottish Court may pronounce a sentence of divorce valid in Scotland and for Scottish purposes, which, however, need not be recognized by the Courts of the domicil of the husband.

(*q*) 8 App. Cas. 43; 52 L. J. P. D. & A. 33

petition for declaration of nullity of marriage, on the ground (among others) that the Scottish Courts could not dissolve an English marriage, that is, a marriage celebrated in England between parties one of whom was a domiciled English subject. The President of the Probate Division dismissed the petition; on appeal, the Court of Appeal upheld his decision, and the decision of the latter Court was in its turn upheld by the House of Lords (*r*). But even before this case the current of thought and opinion was in this direction. Lord Westbury, in *Shaw* v *Gould* (*s*), said: "The right to reject a foreign sentence of divorce cannot rest on the principle . . . that where by the *lex loci contractus* the marriage is indissoluble, it cannot be dissolved by the sentence of any tribunal. Such a principle is at variance with the best established rules of universal jurisprudence, that is to say, with those rules which, for the sake of general convenience, and by tacit consent, are received by Christian nations, and observed in their tribunals. One of these rules certainly is that questions of personal status depend on the law of the actual domicil." Lord Penzance, in *Wilson* v. *Wilson* (*t*), said: "It is the strong inclination of my opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the Courts of the country in which they are domiciled." In *Maghee* v. *M'Allister* (*u*), Lord Chancellor Blackburne held the same view. So, too, in *Shaw* v. *Att.-Gen.* (*x*), Lord Penzance said: "In no case has a foreign divorce been held to invalidate an English marriage between English subjects where the parties were not domiciled in the country by whose tribunals the divorce was granted. Whether, if so domiciled, the English Courts would recognize and act upon such a divorce appears to be a question not wholly free from doubt; but the better opinion seems to be that they would do so if the divorce be for a ground of divorce recognized as such in this country, and the foreign country be not resorted to for the collusive purpose of calling in the aid of its tribunals." Where

(*r*) This case clearly decides the point that a woman on marriage assumes the domicil of her husband for all purposes, which, it is submitted, is inconsistent with the qualification suggested by the Court of Appeal in *Sottomayor* v. *De Barros*, 3 P. D. 1, 7; 5 P. D. 94; 49 L. J. P. D. & A. 1. See *Turner* (f. c. *Thompson*) v. *Thompson*, 13 P. D. 37; 57 L. J. P. 40.

(*s*) L. R. 3 H. L. 55, 83; 37 L. J. Ch. 433.

(*t*) L. R. 2 P. & D. 435, 442.

(*u*) 3 Ir. Ch. Rep. 604.

(*x*) L. R. 2 P. & D. 156, 161; 39 L. J. P. M. & A. 81. This case was decided nearly two years before *Wilson* v. *Wilson* (*ubi sup.*).

the parties are not domiciled in the country of the tribunal which pronounces a decree of dissolution of marriage, the English Courts would be very loath to give effect to the sentence; thus, where a woman who was a domiciled native of the State of Pennsylvania at the time of her marriage in England with a domiciled Englishman returned to her native State, and there procured a divorce from him in a suit in which he was cited but did not submit to the jurisdiction of the Court, and married again, the husband in England was held entitled to a decree of dissolution of marriage with his wife on the ground of her adultery (*y*). The domicil must at any rate be a genuine one, and the proceedings to obtain the decree of dissolution must be free from collusion or fraud (*z*). The case of *Niboyet* v. *Niboyet* (*a*) decided that a residence less than domicil is sufficient to ground divorce proceedings.

Though the various Courts before which the case of *Harvey* v. *Farnie* came had no difficulty in arriving at their decision, it was strongly urged in argument that the resolution of the judges in the celebrated case of *Reg.* v. *Lolley* (*b*) was a strong and binding authority for the contrary of the first proposition set out in the text. The facts of *Lolley's Case* are as follows: Lolley, who was a domiciled Englishman at the time of his marriage, went to Scotland with his wife, and there committed adultery. Lolley went to Scotland for the purpose of inducing and enabling his wife to procure a sentence of divorce. His wife proceeded against him in the Scotch Courts and obtained a decree of dissolution of marriage; his domicil remained English throughout. Lolley, on his return to England, contracted a second marriage, and was indicted for bigamy. He was found guilty. The case came up to the House of Lords on error. The judges were summoned to assist the House, and after argument they unanimously resolved that "no sentence or act of any foreign country or State could dissolve an English marriage *a vinculo matrimonii*, for ground on which it was not liable to be dissolved *a vinculo matrimonii* in England." Here the Scottish domicil of the parties was clearly fictitious, for their domicil remained English the whole time. A considerable war has been waged over the meaning of the term "English marriage," some holding that it was wide enough to embrace

(*y*) *Green* v. *Green*, [1893] P. 89; 62 L. J. P. 112.
(*z*) *Bonaparte* v. *Bonaparte*, [1892] P. 402.
(*a*) 4 P. D. 1.
(*b*) 2 Cl. & F. 567 *n.*

"every marriage contracted in England." Among those was Lord Brougham, who was counsel for Mr. Lolley. His lordship was very angry with the decision, and always thought it wrong, and in order to prove it wrong, as he thought, he proceeded to reduce it to an absurdity, and this he did in the case of *M'Carthy* v. *Decaix* (*c*), when he held that the marriage of a domiciled Dane contracted in England with an Englishwoman could not be and was not dissolved by a competent Danish tribunal on the return of the husband and wife to their Danish domicil. But this case has been distinctly overruled in the House of Lords in *Harvey* v. *Farnie*, and is no longer the law. On the other hand, the remarks of Dr. Lushington in *Conway* v. *Beazley* (*d*), and the distinction laid down by Sir James Hannen and the House of Lords in *Harvey* v. *Farnie*, have supplied the true meaning and limit of the expression "English marriage," in the resolution of the judges in *Lolley's Case*, namely, that it is a marriage where the husband is a domiciled Englishman at the date of the marriage.

"English Marriage" Dissolved by a Competent Court of the Husband's New Domicil.—As it is clear that the tendency of the English authorities is towards holding that the law of the domicil of the parties is the proper and only law by which to test the validity of their divorce, the second question now becomes of importance, namely, "Can an 'English marriage,' that is, one celebrated between domiciled English subjects who afterwards *bona fide* change their domicil, be dissolved by a decree of a Court of competent jurisdiction in the country of their new domicil, for causes sufficient or insufficient by the law of England?"

There is no actual decision on this point, but there are some very strong observations by an eminent judge (*e*), to the effect that, as domicil is the true and proper test, if English domiciled subjects *bona fide* acquired a foreign domicil, and there have recourse to a competent tribunal for the purpose of obtaining a dissolution of their marriage, and do obtain it, the English

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(*c*) 2 Russ. & M. 614; 2 Cl. & F. 568 *n*. The following are the facts: One Tuite, a domiciled Dane, was married to an Englishwoman in England. They left England and went to Denmark, where they were subsequently divorced. The husband's domicil remained Danish the whole of the time. The wife returned to England. Lord Brougham held that the resolution of the judges in *Lolley's Case* prevented the Danish divorce from having any legal operation in England, the marriage between the parties having been contracted in England.

(*d*) 3 Hag. Eccl. Rep. 639.

(*e*) Lord Penzance in *Shaw* v. *Att.-Gen.*, L. R. 2 P. & D. 156, 162; 39 L. J. P. M. & A. 81.

Courts should recognize its validity, at all events if for causes sufficient to ground a divorce in England. But the application of the test of domicil ought to bring out the same results, even where the parties obtain their divorce for causes insufficient to found a dissolution of marriage in England. Thus A. and B., English domiciled subjects, contract a marriage in England, and subsequently acquire a *bona fide* Prussian domicil; they there discover that they cannot get on together through what is termed "incompatibility of temper," which is a good ground for divorce in Prussia; they have recourse to the Prussian tribunals, and obtain a decree of divorce on that ground. The English Courts would probably recognize the validity of the divorce. The Divorce Act of 1857 (*f*), gives power to the Divorce Court to entertain "in England . . . all causes, suits, and matters matrimonial"; and the only limit to its jurisdiction is the requisite English domicil of the parties having recourse to it (*g*). This English domicil is not lost by mere non-residence in this country (*h*). If, then, this Court claims to dissolve marriages celebrated abroad between persons who were not at the time of marriage British subjects, or possessed an English domicil, it is only just and expedient that the Courts of this country should reciprocally recognize the validity of like sentences passed by the Courts of foreign countries.

In summing up the reasons why the *lex domicilii* should prevail in questions of divorce, it may be put forward that, neither the *lex loci celebrationis* nor any foreign law of the parties can claim to be heard beyond the limits of its application (1) to ask for a divorce in a country which does not permit it; or (2) to ask for it on grounds insufficient in the country where the parties are domiciled, though permitted by the *lex fori*; or (3) to forbid a divorce which the public interests of the place where the parties are domiciled demand.

There is yet a third question that may be asked. Can a marriage between two persons retaining their English domicil be dissolved by a foreign Court of competent jurisdiction on grounds sufficient for grounding a divorce in England? It is quite clear that the question should be answered in the negative,

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(*f*) 20 & 21 Vict. c. 85.

(*g*) See *Simonin* v. *Maillac*, 29 L. J. P. M. & A. 97; and *Brodie* v. *Brodie*, 30 L. J. P. M. & A. 185.

(*h*) *D'Etchegoyen* v. *D'Etchegoyen*, 13 P. D. 132; 57 L. J. P. 104. It is not necessary to raise the question of domicil on the pleadings, it can be dealt with at the trial, *Parkinson* v. *Parkinson*, 69 L. T. 53.

if the grounds for divorce in the foreign Court would be insufficient in England. But it is more difficult to state definitely the answer to the above question; because, as will appear lower down, the English Courts have claimed to exercise a jurisdiction to pronounce sentences of divorce between persons not domiciled in this country; and so by a kind of international reciprocity, the sentences of foreign Courts pronounced upon the matrimonial status of English domiciled subjects should be regarded as valid in this country.

The Scottish Courts formerly did not, and those of certain of the American States do not require a domicil of both parties, or of either of the parties, to found jurisdiction in divorce, but a residence far short of domicil, and even a temporary resort to the country for divorce purposes, is sufficient in those States (*i*). It has been seen that the English Courts, according to the better authorities, require more than the mere presence of the parties in a country to produce amenability to the jurisdiction of the *forum*, that is, more than a forensic domicil. They require a domicil *bona fide* and full for all purposes in order to found jurisdiction. Without domicil they refuse to assume jurisdiction, and without domicil in the foreign country they refuse to recognize the divorce there obtained. There are no doubt cases (*k*) which support a view more in accordance with the earlier Scottish and present American principles, that residence short of domicil will suffice to found divorce jurisdiction; but such are either explicable on the ground that they supply some necessary exceptions to a hard-and-fast rule, or they must be put aside as contrary to the general run of the decisions.

An important case on this point is *Niboyet* v. *Niboyet* (*l*), in which the majority of the Court of Appeal (James and Cotton, L.JJ.; Brett, L.J., dissented) held, reversing the decision of Sir Robert Phillimore, that residence of parties in England not amounting to domicil gave the English Divorce Court jurisdiction over their matrimonial relations. The facts were, that A., a domiciled Frenchman, married B., an Englishwoman, at

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(*i*) The principle upon which the Courts of Scotland formerly, and those of some of the American States now proceed is, that the *lex fori* of the parties alone can determine whether or not they shall be divorced; if it permit divorce, and the parties produce grounds for dissolution of the marriage tie recognized by it, the Courts of that *forum* will assume jurisdiction and grant divorce irrespectively of the law under which the parties were married or any foreign law which may affect them.

(*k*) *Deck* v. *Deck*, 29 L. J. P. M. & A. 129; *Brodie* v. *Brodie* (*ubi sup.*).

(*l*) 4 P. D. 1; 48 L. J. P. D. & A. 1.

Gibraltar. A. (with his wife) came to England as a French consul, therefore retaining his French domicil. A. was alleged by B. to have deserted her and committed adultery at various times. Sir R. Phillimore dismissed B.'s petition for dissolution of marriage on the ground of want of jurisdiction. The conclusion arrived at by the two assenting judges of the Court of Appeal was based upon principles which, when applied by the Scottish and other foreign tribunals, the English Courts have steadfastly refused to recognize. They held that because the Courts Christian did not recognize nationality or secular domicil of individuals, but only proceeded against them when necessary wherever they found them *pro salute animarum*, and because the English Divorce Court succeeded to the matrimonial jurisdiction of the ecclesiastical Courts in England by the operation of the Divorce Act, therefore the Court of Divorce must obey the statute and entertain any matrimonial suits brought by persons resident in England, because a divorce *a mensa et thoro* was in previous times an ecclesiastical sentence for the benefit of the soul of the guilty party. The logical conclusion of this decision is that if a Frenchman and wife come over to England, and the former commits adultery and cruelty while only temporarily sojourning here, the wife may bring a petition for divorce, and the Courts must entertain it. This decision clothes the English Court of Divorce established under the Divorce Act, 1857, with complete jurisdiction over all married couples temporarily commorant in this country. The legislature has so clothed it probably quite unintentionally. Lord Justice James said he thought he was not overruling any English cases in so holding; but the cases set out below show that it was somewhat too full an assertion (*m*); and as the House of Lords has repeatedly held

(*m*) *Lolley's Case*, R. & R. 237; 2 Cl. & F. 567 *n.*; *Warrender* v. *Warrender*, 2 Cl. & F. 488 (Scottish case); *Conway* v. *Beazley*, 3 Hag. Ecc. Rep. 639; *Yelverton* v. *Yelverton*, 29 L. J. P. M. & A. 34; *Tollemache* v. *Tollemache*, 30 L. J. P. M. 115; *Firebrace* v. *Firebrace*, 4 P. D. 63; 47 L. J. P. D. & A. 41; *Ratcliff* v. *Ratcliff*, 29 L. J. P. M. & A. 171; *Wilson* v. *Wilson*, L. R. 2 P. & D. 435 (per Lord Penzance); and see *Briggs* v. *Briggs*, 5 P. D. 163; 49 L. J. P. D. & A. 38. The leading American text-writers hold that domicil is necessary for divorce jurisdiction. Story (Conf. Laws, s. 230 *a*) says: "The doctrine now firmly established in America upon the subject of divorce is, that the law of the place of the actual *bona fide* domicil of the parties gives jurisdiction to the proper Courts to decree a divorce for any cause allowed by the local law, without any reference to the laws of the place of the original marriage, or the place where the offence for which the divorce is allowed was committed." Again, Bishop (Mar. and Div. s. 120 *b*) says: "The rule is believed to be that the domicil must be complete and full, in distinction from a *quasi* domicil, adequate for every other purpose"; and (s. 124 *a*) that mere residence as distinguished from domicil is insufficient; but that the residence must not only be permanent but accompanied with an *animus manendi*.

a full and *bona fide* domicil to be necessary to found divorce jurisdiction, *Niboyet* v. *Niboyet* seems to create an exception to the general law of the land on this point. Brett, L.J., strongly insisted upon the principle that the only law which should take upon itself to alter the status of married persons should be the law of their domicil, that is, the husband's domicil; for it is the community of their domicil that is affected by their relation towards one another. In commenting upon *Brodie* v. *Brodie* (*n*), his lordship quoted the judgment of the Court, which was: "We say nothing as to what the effect of the evidence might be in a testamentary suit; we think that the petitioner was *bona fide* resident here, not casually or as a traveller. After he became resident here, his wife was carrying on an adulterous intercourse in Australia. He is therefore entitled to a decree *nisi* for a dissolution of the marriage"; and remarked: "If this was held to be a domicil, it is consistent with all the cases; if it is to be taken as a decision that there can be a minor species of domicil sufficient for one purpose and not for another, I know of no authority or ground of reason for such a distinction. I cannot agree with it." It is to be noticed that the different judges who constituted the House of Lords in the case of *Harvey* v. *Farnie* did not in any way accept without questioning the accuracy of the decision in *Niboyet* v. *Niboyet*; and laid some stress upon the fact that the Court of Appeal was divided. While it was not obligatory upon them to overrule it, or impugn its authority, they did not accept it as an absolutely accurate decision. Apart from any other considerations, the domicil of the parties ought to be the test of jurisdiction, if only to prevent the risk of collusion, and the scandalous and disgraceful abuse of the Courts being resorted to for the purpose of evading the irksome fetters imposed by the law of their domicil. Mere temporary residence within their jurisdiction would otherwise suffice, and every guarantee against fraud and chicanery would be rendered powerless and ineffectual. If *Niboyet* v. *Niboyet* is to be taken as an accurate exposition of the law of England, the residence of the petitioning party must be a genuine one, and the proceedings to obtain the decree of dissolution must be free from collusion

(*n*) 30 L. J. P. M. & A. 185. In the suit it was proved that the husband was an Australian and domiciled in Australia, where both the marriage and the wife's adultery took place, but at the time of the suit was resident in England.

or fraud (*o*). Again, if it does represent the law of this country, the English Courts will find great difficulty in refusing to recognize the validity of decrees of dissolution of marriage pronounced by competent foreign tribunals of domiciled English subjects resident abroad whether for causes sufficient or insufficient by the law of this country.

Domicil Necessary in Suit for Dissolution of Marriage.—The authority of this case can no longer be deemed unquestionable, for the Privy Council in *Le Mesurier* v. *Le Mesurier* (*p*) held that there was an obvious fallacy running through the judgments of the majority of the Court of Appeal, that because the Divorce Court succeeded to the jurisdiction of the old ecclesiastical Courts which had the power to grant divorces *a mensa et thoro*, restitution of conjugal rights, and make decrees for alimony, whether the parties were domiciled in England, or only temporarily resident, therefore the new Court had jurisdiction to pronounce a decree for dissolution of marriage between parties who were not domiciled in England. In *Armytage* v. *Armytage* (*q*), Barnes, J., treated *Niboyet* v. *Niboyet* (*r*) as practically overruled by *Le Mesurier* v. *Le Mesurier* (*s*). Still further doubts have been thrown on the accuracy of this case by the action of the House of Lords in *Malone's Divorce* (*Validation*) *Bill* (*t*). In a still later case (*u*) Swinfen Eady, J., quoted the following passage from the speech of Lord Watson in *Le Mesurier* v. *Le Mesurier* (*x*): "When carefully examined neither the English nor the Scottish decisions are, in their Lordships' opinion, sufficient to establish the proposition that, in either of these countries, there exists a recognized rule of general law to the effect that a so-called matrimonial domicil gives jurisdiction to dissolve marriages," and decided that by a mere temporary residence of the husband alone in North Dakota he did not acquire even a "so-called matrimonial domicil," that it was not a *bona fide* residence, and that the divorce obtained by the husband in North Dakota

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(*o*) See *Bonaparte* v. *Bonaparte*, [1892] P. 402.
(*p*) [1895] A. C. 517; 64 L. J. P. C. 97. The decisions of the Privy Council are not binding on the English justiciary; but they are treated with the greatest respect.
(*q*) [1898] P. 178; 67 L. J. P. 90.
(*r*) 4 P. D. 1; 48 L. J. P. D. & A. 1.
(*s*) *Ubi sup.*
(*t*) [1905] A. C. 314.
(*u*) *Re Stirling, Stirling* v. *Stirling*, [1908] 2 Ch. 344; 77 L. J. Ch. 717.
(*x*) [1895] A. C. 536; 64 L. J. P. C. 97.

had no validity. The visit was made by the husband for the sole purpose of obtaining a divorce which there was difficulty, if not insuperable difficulty, in obtaining in Scotland, the country of his domicil.

An important point was discussed in *Ogden* v. *Ogden* (*y*). There a marriage had been celebrated in England between a domiciled Englishwoman and a domiciled Frenchman. The Frenchman gave his age as twenty-two, but he was only nineteen, and he afterwards obtained a decree of nullity in France on the ground of the absence of his parents' consent. The wife petitioned in England for dissolution on the ground of adultery and desertion, and the petition was dismissed for want of jurisdiction. Later she was married to an Englishman, describing herself as a widow. Her husband petitioned for nullity and succeeded; and in the Appeal Court it was suggested that the Court might have assumed jurisdiction in the wife's original suit by treating her as having a domicil in her own country sufficient to support such a suit, her husband having debarred her from obtaining any relief in the country of his domicil. In the case of *Stathatos* v. *Stathatos* (*z*) an Englishwoman married a Greek in London, who afterwards obtained a decree of nullity in Greece on the ground that there was no Greek priest present at the marriage, and he married again. Bargrave Deane, J., treated the wife as having a sufficient domicil here to support such a suit.

The rule that the domicil of the husband governs the jurisdiction in divorce suits may be departed from in proper circumstances, such as where the husband or his parents have obtained abroad a decree of nullity, and the wife is thus debarred from obtaining relief in the foreign Court. In such a case she will be treated as having sufficient domicil in this country for the Court to have jurisdiction to entertain her petition for dissolution (*a*).

The English Court of Divorce has jurisdiction to entertain a suit for divorce *a mensa et thoro* on the ground of cruelty where the parties reside within its jurisdiction at the beginning of the suit, though not domiciled in England, though the cruelty was committed outside the jurisdiction, if apprehension of further acts of cruelty exists (*b*).

(*y*) [1908] P. 46; 77 L. J. P. 34.
(*z*) [1913] P. 46; 82 L. J. P. 34.
(*a*) *de Montaigu* v. *de Montaigu*, [1913] P. 154, adopting the *dicta* of Lord Gorell in *Ogden* v. *Ogden* (*supra*) and approving *Stathatos* v. *Stathatos* (*supra.*).
(*b*) *Armytage* v. *Armytage*, [1898] P. 178; 67 L. J. P. 90.

The decree of the High Court of Judicature in any of the Indian Presidencies, dissolving the marriage of British subjects professing the Christian religion under 24 & 25 Vict. c. 104, s. 9, the letters patent of December 28, 1865, and the Indian Divorce Act of 1869, will be recognized in this country (c).

(c) *In the Goods of Nares*, 13 P. D. 35; 57 L. J. P. 19.

PART II.

PARENT AND CHILD.

CHAPTER I.

LEGITIMACY.

Relation of Parent and Child.—"The next and most universal relation in nature is immediately derived from the preceding, being that between parent and child" (*a*). The relation of parent and child is an important element in the constitution of the family. There are two classes of children; (1) legitimate, and (2) illegitimate. Legitimate children are those born within wedlock, or within some reasonable time after its dissolution. Illegitimate, or bastard children (*spurii, filii nullius*), are those not born in lawful wedlock, or if so born, are proved not to have been begotten by the husband of their mother.

The full and complete legal relations of parent and child in England can only exist where the child has been born of his parents in lawful wedlock. Legitimacy is derived from birth in wedlock and from nothing else. The law of England, like that of Rome, recognizes broadly the doctrine *pater est quem nuptiæ demonstrant* (*b*), or the paternity of the child is tested or proved only by reason of its having been born of a union sanctioned by the law. The *patria potestas*, or parental dominion, extends over such a child. Bastards are, according to the stricter interpretation of the law, strangers to those who have brought them into being. The Legislature, however, on ground of public policy, has recognized the natural tie existing between them and their parents, and has imposed the obligation of their support and maintenance upon the latter. This subject of parent and child will be treated of under the headings of legitimate and illegitimate children.

(*a*) Bl. Com. 446.
(*b*) Just. Inst. Bk. 1, tit. ix.

Legitimate Children.—Legitimacy is a status arising out of the fact of birth within lawful wedlock, or within a reasonable time after its dissolution, or an act of legitimation subsequent to birth out of wedlock. By the law of England the full and complete relations of parent and child can only exist where the child has been born of parents in lawful wedlock. It is true that Blackstone (*c*) mentions the possibility of legitimation by Act of Parliament in cases where the parents have not married subsequently to the birth, as was done in the case of the bastard children of John of Gaunt, Duke of Lancaster; but practically, as regards persons born of parents domiciled in England at the time of birth, legitimacy proceeds alone from birth in lawful wedlock. "Legitimacy by birth depends on two facts; the one is the lawful marriage of the parents of the child, and the other that the child is the fruit of that marriage" (*d*). From legitimacy flow many important considerations, the right of inheritance, the right of bearing the father's name, kinship and family ties, involving the right to be maintained, educated, and protected.

Presumption of Legitimacy (*e*).—The English law adopts as a presumption the Roman law maxim *pater est quem nuptiæ demonstrant*; in other words, the child of a married woman is presumed to be legitimate.

This presumption holds good not only where the child is born some time after the celebration of the marriage, but where it is born within such a short time after that the conception could not have taken place in wedlock. Thus, if a man marries a woman with child, whether begotten by him or some other man, the child when born is presumed to be his, and legitimate until the contrary be shown (*f*). If proof is forthcoming that the man knew of the condition of the woman before marriage, there is a very strong presumption that it is his own, "for where a man marries a woman whom he knows to be in this situation, he may be considered as acknowledging by a most solemn act that the child is his" (*g*). *Foxcroft's Case* (*h*),

(*c*) 1 Com. 459. (*d*) 1 Bur. For. & Col. Laws, 58.
(*e*) See also Illegitimate Children, ch. vi., *post*.
(*f*) Co. Litt. 244 (a).
(*g*) *Rex* v. *Luffe*, 8 East, 193, 210, per Lawrence, J., citing the authority of Lord Rolle.
(*h*) 10 E. 1 B. Rot. 23; 1 Rol. Abr. 359. This was a case of an infirm and bedridden man who married a woman far gone with child, not in a church, and without the Mass being said. The child was born twelve weeks after the marriage, and was adjudged a bastard, probably on the ground of the invalidity of the marriage.

it is true, has been held to be an authority against this proposition, but probably this is due to a wrong view of the case; and the law as above is clear and without dispute. Where after open courtship and constant intercourse a man and woman, she being in an advanced state of pregnancy, hurry on their marriage to prevent or mitigate scandal, and a child is born soon after, the presumption that the husband is father to that child is next to insuperable, and the *onus* of establishing his denial of paternity lies upon him (*i*). And where a man has been reputed all his life to be the legitimate child of his parents, those who dispute his legitimacy after his death must produce very strong and unequivocal evidence in support of their contention (*k*).

This presumption of legitimacy, which is based on the interests of morals and society, is very strong, but not one *juris et de jure* so as never to be assailed or impugned, and consequently exceptions to the rules have at all times been admitted (*l*). The civil law admitted four exceptions: (1) The absolute and permanent impotence of the husband; (2) the accidental impotence or bodily disability of the husband; (3) his absence from his wife during that period of time in which, to have been the father of the child he must have had intercourse with her; (4) long-continued non-intercourse from sickness or other reason.

Presumption Rebuttable (*m*).—In English law this presumption may be rebutted by proof of non-access on the part of the husband (*n*). The rebutting evidence must not be circumstances which only create doubt and suspicion, but must be strong, distinct, satisfactory, and conclusive (*o*). Mere adultery of the wife is not enough (*p*); and where husband and wife have cohabited together, and no impotency is proved, the issue is conclusively proved to be legitimate, though the wife is shown

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(*i*) *Gardner* v. *Gardner*, 2 App. Cas. 723.
(*k*) *Haslam* v. *Cron, Re Olivant*, 19 W. R. 968.
(*l*) *Bosvile* v. *Att.-Gen.*, 12 P. D. 177; 56 L. J. P. 97.
(*m*) See also Legitimacy, ch. i., *ante*.
(*n*) By Scottish law "the rule, *pater est quem nuptiæ demonstrant*, creates merely a *presumptio juris*, which may be redargued by contrary proof, showing that the child cannot be the issue of the husband and wife. The grounds upon which the presumption may be overthrown resolve themselves into two: (1) That the husband could not have sexual intercourse with his wife by reason of his impotency; and (2) that, having the power, he had in fact no sexual intercourse with her at the time of the conception."—Fraser, P. & C. 4.
(*o*) *Morris* v. *Davies*, 5 Cl. & F. 163; *Atchley* v. *Sprigg*, 33 L. J. Ch. 345; *Bosvile* v. *Att.-Gen.*, 12 P. D. 177; 56 L. J. P. 97.
(*p*) See *Gordon* v. *Gordon and Gordon*, [1903] P. 141; 72 L. J. P. 33; *post*, ch. vi., p. 582.

to have been at the same time guilty of adultery (*q*), even in cases where her adultery is notorious (*r*), and no evidence except to disprove it will be admitted (*s*). But where the husband and wife have been judicially separated, and the latter bears children, they are *prima facie* illegitimate, for the parents will be deemed to have obeyed the sentence of the Divorce Court (*t*). The same principle applies where a separation order has been made by magistrates (*u*). The old common law rule that husband or wife cannot give evidence to prove access or non-access (*x*), whether directly or indirectly, so as to bastardize their issue, is still recognized (*y*), even to the extent of the wife not being allowed to identify the person as her husband whose absence from her at the material time has been proved by other witnesses (*z*). The paramour of the wife is not affected by the rule and may give direct evidence (*a*). But in pedigree cases where the legitimacy of a child born in wedlock is in issue, previous statements by the mother that the child is a bastard are admissible as evidence of her conduct though such statements could not be made by her in the witness box (*b*). It is true, however, that by the Evidence Amendment Act, 1869 (*c*), "in proceedings instituted in consequence of adultery," that is, in matrimonial suits, the wife, as well as the husband, may give evidence as to her adultery, and so indirectly afford important testimony as to the bastardy of her child or children (*d*); but the bastardizing of such child or children cannot directly follow from such evidence (*e*). There are two modern equity decisions (*f*) (one of which no doubt directly impugns the common law doctrine), the authority of which has been denied in a still later case (*g*). In *Re Rideout's Trusts*, James, V.-C., admitted

(*q*) *Cope* v. *Cope*, 1 M. & R. 269; *Morris* v. *Davies* (*ubi sup.*).
(*r*) *Reg.* v. *Mansfield*, 1 Q. B. 444; *Atchley* v. *Sprigg* (*ubi sup.*).
(*s*) Opinion of the judges in *The Banbury Peerage Case*, 1 Sim. & St. 156; Nic. Ad. Bast.
(*t*) *St. George* v. *St. Margaret*, 1 Salk. 123.
(*u*) *Hetherington* v. *Hetherington*, 12 P. D. 112; 57 L. J. P. 78; *Andrews* v. *Andrews and Chalmers*, [1924] P. 255; 93 L. J. P. 137.
(*x*) *Goodright* v. *Moss*, Cowp. 591; *Rex* v. *Sourton*, 5 A. & E. 180.
(*y*) *Ulverstone Union* v. *Park*, 53 J. P. 629; *Hewat's Divorce Bill*, 12 App. Cas. 312; *Russell* v. *Russell*, [1924] A. C. 687; 93 L J. P. 97.
(*z*) *Brown* v. *Leech*, 94 L. J. K. B. 48.
(*a*) *Evans* v. *Evans and Blyth*, [1904] P. 378.
(*b*) *Aylesford Peerage Case*, 11 App. Cas. 1.
(*c*) 32 & 33 Vict. c. 68.
(*d*) Sect. 3.
(*e*) See *Pryor* v. *Shelford*, 12 P. D. 165; 56 L. J. P. 77; *Hewat's Divorce Bill* (*ubi sup.*).
(*f*) *Re Rideout's Trusts*, L. R. 10 Eq. 41; 39 L. J. Ch. 192; *Re Yearwood's Trusts*, 5 Ch. D. 545; 46 L. J. Ch. 478.
(*g*) *Nottingham Union* v. *Tomkinson*, 4 C. P. D. 343; 48 L. J. M. C. 171.

the husband's evidence to prove non-access, though he required corroborative evidence. In *Re Yearwood's Trusts*, Hall, V.-C., on the assumption that the earlier case had altered the law, and that the proceedings before him had been instituted in consequence of the wife's adultery, admitted the husband's evidence to prove non-access, though he required it to be corroborated. But in the more recent case of *The Guardians of Nottingham Union* v. *Tomkinson* the Common Pleas Division was of opinion that "proceedings instituted in consequence of adultery" in the Evidence Amendment Act, 1869, are confined to proceedings in the Divorce Courts for divorce or judicial separation; and that apart from such proceedings the evidence of husband or wife to prove non-access with the result of bastardizing the issue was inadmissible. Such non-access must be proved *aliunde*. This rule, which has been decisively recognized by the majority decision in the House of Lords in *Russell* v. *Russell* (*h*), is based upon good sense and public policy; for the indecency of husband or wife giving such evidence is avoided; and any temptation to bastardize a particular child is defeated and discouraged. The non-access of the husband may be supported by proof of (1) natural or physical impossibility; (2) moral impossibility.

(1) Natural or physical impossibility may be due to *impotence* on the part of the husband, whether arising from natural or accidental causes. It may also arise from the *absence* of the husband. "The physical impossibility, arising from the absence of the husband, exists when the birth of a child takes place at a period so distant from the commencement of that absence, or so recently after it has ceased, that it cannot, according to the course of nature, be attributed to his sexual intercourse with his wife" (*i*).

Under the old common law a child born during the marriage of its parents was presumed to be legitimate except for "special matter." Special matter, or bastardy, arose from (1) the impotence of the husband; (2) his being separated from his wife by sentence of divorce, for separation without such sentence was insufficient; (3) his being *extra quatuor maria*, that is, being absent from the King of England's dominions when the child was conceived (*k*). The ridiculous doctrine that unless the husband of the mother happened to be abroad and out of England,

(*h*) [1924] A. C. 687; 93 L. J. P. 97.
(*i*) 1 Bur. For. & Col. Laws, 63.
(*k*) Nicolas, Ad. Bast. 28.

a child born to her must conclusively be deemed to be his, though convincing evidence might be adduced that he could not be the father, and was during the whole period of gestation hundreds of miles away from the mother, has been for a long time exploded (*l*). The effect of absence on the question of bastardy does not depend upon the propinquity or distance of the husband from the wife during the alleged period of absence and non-access; the parties might be living in the same town, yet if conclusive evidence was produced that there was no such access as might have resulted in the birth of the child, the effect of such evidence will be to rebut the presumption that the husband availed himself of possible opportunities of sexual intercourse with his wife (*m*). If ever it was held necessary that the husband must be absent from his wife the whole period of gestation, that is, before the child could have been conceived, and after its birth, it is no longer so; and it is enough if the husband returns at such a time anterior to the birth that he could not by the ordinary laws of nature be the father of the child (*n*).

(2) Physical impossibility need not be made out, but the *moral* impossibility of access of the husband to the wife will have due weight given to it, even to the rebutting of the presumption of the legitimacy of the child born during the lawful wedlock of the husband and wife. By *moral impossibility of access* is meant the conclusion arrived at from the surrounding circumstances of the case that the husband, though having possible opportunities of sexual intercourse with his wife, did not avail himself of them, so as to be the father of his wife's child born amidst such circumstances.

Banbury Peerage Case.—This doctrine, implying that the presumption of legitimacy is only a question of fact, and if unsupported or contradicted by evidence may be rebutted, was finally and fully established by the answers of the judges and decision of the House of Lords in the important case known as the *Banbury Peerage Case* (*o*). Lord Redesdale, in his judgment (*p*), sums up the law with great force and clearness. He says: "I admit that the law presumed the child of the wife of

(*l*) *Pendrell* v. *Pendrell*, 2 Str. 925; *Rex* v. *Luffe*, 8 East, 193; *Shelley* v. ——, 13 Ves. 56.

(*m*) *Morris* v. *Davies*, 5 Cl. & F. 163; *Atchley* v. *Sprigg*, 33 L. J. Ch. 345; *Aylesford Peerage Case*, 11 App. Cas. 1.

(*n*) *Rex* v. *Luffe* (*ubi sup.*).

(*o*) 1 Sim. & St. 153.

(*p*) *Ibid.* 462. See 1 Bur. For. & Col. Laws, 79.

A., born when A. might have had sexual intercourse with her, or in due time after, to be the legitimate child of A.; but this was merely considered as a ground of presumption, and might be met by opposing circumstances. *The fact, indeed, that any child is the child of any man, is not capable of direct proof, and can only be the result of presumption*; understanding by presumption, a probable consequence drawn from facts (either certain or proved by credible testimony), by which may be determined the truth of a fact alleged, but of which there is no direct proof. Thus, if A. and A.* are married, and are in such habits of intercourse that A. may be the father of a child born of the body of A.*, immediately produced as the child of A., and received as such by A., the child is presumed to be his child, though the fact of sexual intercourse cannot be proved; and if the death of A. before the birth of the child prevents its reception by him as his child, yet if the birth happen within a time which in ordinary course is the longest time of pregnancy before birth, the child is presumed to be the child of A. If a child is born of the body of A.* and alleged to be the child of A., *but not so acknowledged by him*, nor produced on its birth as *his child*, yet if circumstances would admit of sexual intercourse, and the non-production of the child as the child of A. can be sufficiently accounted for, it will be presumed that the child is the child of A. But in all these cases, the fact that the child is the child of A. is a fact presumed and not proved. When, therefore, circumstances occur which may tend to rebut the presumption that a child born of the body of A.*, the wife of A., is his child, then, presumption rebutting presumption, the conclusion must be drawn from the whole evidence."

During the course of the investigation in this case, the help of the judges was obtained, and to them were put certain questions. Their answers and the decision of the committee declared the law to be that, notwithstanding opportunities of intercourse between husband and wife, and here they were living in the house, and were even seen in bed together, if the evidence of surrounding circumstances would warrant the clear conclusion of the *moral impossibility* of access or sexual intercourse of the husband with his wife, the legitimacy of children born of the wife amid such surrounding circumstances may be successfully contested.

Opinions of the Judges.—Some of the answers were as follows:—

The presumption of legitimacy arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other during the period in which a child could be begotten and born in the course of nature, may be rebutted by circumstances inducing a contrary presumption.

The fact of the birth of a child from a woman united to a man by lawful wedlock, is generally, by the law of England, *prima facie* evidence that such child is legitimate. In every case in which there is *prima facie* evidence of any right existing in any person, the *onus probandi* is always upon the person or party calling such right in question. Such *prima facie* evidence of legitimacy may always be lawfully rebutted by satisfactory evidence that such access did not take place between the husband and the wife as by the laws of nature is necessary in order for the man to be, in fact, the father of the child. The physical fact of impotency, or of non-access, or of non-generating access, as the case may be, may always be lawfully proved by means of such legal evidence as is strictly admissible in every other case in which it is necessary, by the law of England, that a physical fact be proved.

After proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of a child (by which we understand proof of sexual intercourse between them), no evidence can be received except it tend to falsify the proof that such intercourse had taken place.

In every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when by such intercourse, the husband could, according to the laws of nature, be the father of such child.

The presumption of legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, can only be legally resisted by evidence of such facts or circumstances as are sufficient to prove to the satisfaction of those who are to decide the question that no sexual intercourse did take place between the husband and wife

at any time, when, by such intercourse, the husband could by the laws of nature be the father of such child. Where the legitimacy of a child in such a case is disputed, on the ground that the husband was not the father of such child, the question to be left to the jury is, Whether the husband was the father of such child? And the evidence to prove that he was not the father must be of such facts and circumstances as are sufficient to prove to the satisfaction of a jury that no sexual intercourse took place between the husband and wife at any time, when, by such intercourse, the husband could by the laws of nature be the father of such child. The non-existence of sexual intercourse is generally expressed by the words "non-access of the husband to the wife"; and we understand those expressions as applied to the present question as meaning the same thing, because in one sense of the word "access" the husband may be said to have access to his wife as being in the same place or the same house, and yet under such circumstances as, instead of proving, tend to disprove that any sexual intercourse took place between them.

The law laid down in this case was followed in subsequent cases, especially in that of *Morris* v. *Davies* (*q*). Here the husband and wife voluntarily separated; but the husband lived only fifteen miles off, visited his wife, and had opportunities of sexual intercourse. She was delivered of a child during the separation, and there was nothing *physically* impossible in the husband being the father; but, looking at the conduct of the wife and the supposed paramour before and after the birth, it was held morally impossible that the husband could have been the father of the child, and the child was declared a bastard. Where husband and wife lived apart, at a distance of only six miles, non-access under the circumstances of the case was rightly presumed (*r*).

Legitimacy a Question of Fact.—The legitimacy of a child is therefore a question of fact, to be decided one way or the other, according to the evidence produced to support or rebut it. The evidence cannot properly include the opinion of a sculptor called in by the Judge as to the likeness of a child to its alleged parents (*s*). The law on the subject has been thus

(*q*) 5 Cl. & F. 163. See also *The Barony of Saye and Sele*, 1 Cl. & F. 507; *Hargrave* v. *Hargrave*, 9 Beav. 552; *Sibbett* v. *Ainsley*, 3 L. T. 583; and *Gurney* v. *Gurney*, 8 L. T. 380.

(*r*) *Ulverstone Union* v. *Park*, 53 J. P. 629.

(*s*) *Slingsby* v. *Att.-Gen.*, 33 T. L. R. 120.

summed up: A child born of a married woman is, in the first instance, presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances which only create doubt and suspicion; but it may be wholly removed by proper and sufficient evidence by showing that the husband was (1) incompetent; (2) entirely absent, so as to have had no intercourse or communication of any kind with the mother; (3) entirely absent, at the period during which the child must, in the course of nature, have been begotten; or (4) only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse. Such evidence as this puts an end to the question, and establishes the illegitimacy of the child of a married woman (*t*).

According to English law there is no fixed period of utero-gestation, or the length of time which elapses from the conception of the fœtus to the birth of the child; and the question in each case will be determined by the weight of the evidence offered (*u*).

Legitimation.—In most countries where the civil or canon law has made its influence felt, the marriage of the parents of children born before marriage and recognized to be their offspring operates to legitimate those children, and places them on an equal footing with those born during wedlock in all respects affecting status and property, and gives a wide effect to the maxim *pater est quem nuptiæ demonstrant*. The law of England has steadily refused to recognize this process of legitimation. As far back as the reign of Henry III., the bishops desired to introduce the canon law rule of legitimation by subsequent marriage, and sought the consent of the barons to the proposed change, but the latter unanimously refused to permit it, saying, *Quod nolunt leges Angliæ mutare quæ usitatæ sunt et approbatæ* (*x*).

(*t*) Per Lord Langdale in *Hargrave* v. *Hargrave*, 9 Beav. 552, 555.

(*u*) *Gardner Peerage Claim*, cited 5 Cl. & F. 264; Le Marchant. The ordinary period of gestation is deemed to be 270-275 days, and where a child was born 276 days after the last opportunity of sexual intercourse between husband and wife, it was adjudged under the circumstances of the case to be a bastard. *Bosvile* v. *Att.-Gen.*, 12 P. D. 177; 56 L. J. P. 97; but in *Williamson* v. *M'Clelland*, 50 Sc. L. R. 469, it was held that 306 days were not an impossible period of gestation and an affiliation order was made in *Bowden* v. *Bowden*, 62 Sol. J. 105, where a child was born 307 days after the husband left his wife, there being no other evidence of adultery, the husband's petition was dismissed; and in *Gaskill* v. *Gaskill*, [1921] P. 425; 90 L. J. P. 339, the only evidence of adultery being the abnormal length of the period, viz., 331 days, it was held on the medical evidence that this was not an impossible period, and the petition was dismissed.

(*x*) Stat. Mert. 20 Hen. III. c. 8 (1235). "Ac rogaverunt omnes Episcopi Magnates, ut consentirent, quod nati ante matrimonium essent legitimi, sicut illi qui nati sunt post matrimonium, quantum ad successionem hereditariam, quia

From that day to this the law has never admitted the legitimacy of those born before the marriage of their parents, whether born in England or in a country permitting legitimation by subsequent marriage, so far as succession to English land is affected; in other words, for the purpose of succession to real estate the foreign status of legitimacy by the subsequent marriage of the parents is not recognized by the law of England (*y*). As regards personal property this rule does not hold good under all circumstances.

There is nothing really analogous to legitimation by imperial (afterwards papal) rescript in the law of England; though Blackstone does mention the possibility of legitimation of bastards by Act of Parliament in cases where the parents have not married subsequently to the birth of their children, as was done in the case of the bastards of John of Gaunt, Duke of Lancaster (*yy*).

Status of Legitimacy.—Four principles are to be extracted from the English law with reference to the effect of the status of legitimacy of children conferred by the after-marriage of parents.

(1) **As to Real Property.**—Where a person who claims real property as heir was not born in lawful wedlock (*natus ex justis nuptiis*), his status of legitimacy by the after-marriage of his parents in a country conferring such legitimacy upon him, will not be recognized by the law of England (*z*).

(2) **As to Personal Property.**—Where a claim is made to personal property *ab intestato* by a person born before the marriage of his parents in a country whose laws do not recognize legitimation by the after-marriage of his parents, who subsequently intermarry in a country whose laws do recognize it (whether domiciled or not in the latter country), such claim will be refused, as the law of England does not recognize the legitimacy of the claimant, on the ground that being illegitimate by the law of his domicil of origin, he is to be taken to be illegitimate by the law of this country (*a*).

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ecclesia tales habet pro legitimis. Et omnes Comites et Barones unâ voce responderunt, Quod nolunt leges Angliæ mutare, quæ usitatæ sunt et approbatæ."

(*y*) *Re Goodman's Trusts*, 17 Ch. D. 266; 50 L. J. Ch. 425. Per Lush, L.J., summing up the effect of *Birtwhistle* v. *Vardill*, 7 Cl. & F. 895. (*yy*) 1 Bl. Com. 459.

(*z*) *Birtwhistle* v. *Vardill* (*ubi sup.*). See the converse case of *Munro* v. *Munro*, 7 Cl. & F. 842, which decided that a child illegitimate by English law, but legitimate by Scotch, took as lawful heir to entailed estates in Scotland.

(*a*) The effect of the cases of *Shedden* v. *Patrick*, 1 Macq. H. L. Cas. 535, and *Re Wright's Trusts*, 25 L. J. Ch. 621; *Re Goodman's Trusts*, 17 Ch. D. 266; 50 L. J. Ch. 425. See *Re Grove, Vaucher* v. *Solicitor to the Treasury*, 40 Ch. D. 216; 58 L. J. Ch. 57.

(3) Where a claim is made to personal property *ab intestato* by a person born before the marriage of his parents, and his father was domiciled (*b*) in a country whose laws recognize legitimation by the after-marriage of his parents both at the date of his birth and at the date of the marriage of his parents, such claim will be acceded to, as the law of England recognizes the legitimacy of the claimant, on the ground that being legitimate by the law of his domicil of origin he is to be taken as legitimate by the law of this country (*c*). But the after-marriage of the parents, to bring about the legitimation of their *ante-nati* children, must be lawful in its inception by the laws of the country in which, while domiciled, they contract the marriage which so legitimates their offspring (*cc*).

(4) As to real and personal property: Where a claim is made to real or personal property not as heir or *ab intestato*, but under a testamentary disposition by way of specific devise (*d*), or bequest by a person (as for instance by a "son" or "child" of the testator) born before the marriage of his parents, who are domiciled at the date of the birth and subsequent marriage in the father's country, whose laws recognize legitimation by after-marriage of parents, such claim will be acceded to, as the law of England recognizes his status of legitimacy, but not under other circumstances (*e*).

New Law of Inheritance.—The distinction as to the rules of inheritance on intestacy as between real and personal property is abrogated by the Administration of Estates Act, 1925 (*f*). By section 33, sub-section 1, that Act provides that on the death of a person intestate as to any real or personal estate, such estate shall be held by his personal representatives: (a) as to the real estate upon trust to sell the same; and (b) as to the personal estate upon trust to call in, sell and convert into

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(*b*) If the parents have different domicils (as may happen when they are not married), the authorities show that the domicil of the father and not that of the mother is to be regarded. See *Munro* v. *Munro*, 7 Cl. & F. 842; *Udny* v. *Udny*, L. R. 1 H. L. Sc. 441.

(*c*) *Re Goodman's Trusts* (*ubi sup.*); *Re Grove, Vaucher* v. *Solicitor to the Treasury* (*ubi sup*).

(*cc*) *Lapsley* v. *Grierson*, 1 H. L. Cas. 498. A death-bed marriage of a man domiciled in Scotland has by the law of that country the effect of legitimating his offspring. *The Lauderdale Peerage Case*, 10 App. Cas. 692.

(*d*) *Re Grey's Trusts*, *Grey* v. *Stamford*, [1892] 3 Ch. 88; 61 L. J. Ch. 622.

(*e*) *Goodman* v. *Goodman*, 3 Giff. 643; 28 L. J. Ch. 745; see *Anderson* v. *Atkinson*, 21 Ch. D. 100; 51 L. J. Ch. 452; *Re Goodman's Trusts* (*ubi sup.*); *Andros* v. *Andros*, 24 Ch. D. 637; 52 L. J. Ch. 793; *Re Grove, Vaucher* v. *Solicitor to the Treasury* (*ubi sup.*); *Re Grey's Trusts*, *Grey* v. *Stamford* (*ubi sup.*).

(*f*) 15 Geo. V. c. 23.

money such part thereof as may not consist of money, upon trust to pay the debts and funeral and testamentary expenses and to provide for any pecuniary legacies bequeathed by the will (if any) of the deceased, and the residue becomes the residuary estate of the deceased. By section 45, sub-section 1, in the case of every person dying after December 31, 1925, all existing modes, rules and canons of descent are abolished, whether operating by the general law or by Gavelkind or Borough English or any other custom, the rights of the husband as tenant by the curtesy, and the rights of the wife to dower and freebench are abolished, and the estate remaining subject to the rights of the surviving spouse is described as the residuary estate, and is held upon the trusts set out hereafter in Chapter III.

Domicil of Children.—The last point more particularly to be discussed is the domicil of the children. This falls naturally into three sub-divisions—(1) legitimate children; (2) legitimated children; and (3) illegitimate children. The first two only will be here discussed; the third will be reserved for the chapter on illegitimate children (*i*). In elucidating this question Mr. Dicey's valuable work on Domicil has been laid under contribution.

Legitimate Children.—In the case of a legitimate infant born during his father's lifetime, the domicil of origin of the infant is the domicil of the father at the time of the infant's birth (*k*).

The domicil of a legitimate infant is, during the lifetime of his father, the same as, and changes with, the domicil of his father (*l*). Thus, under the Divided Parishes Act (a Poor Law statute) (*m*), a legitimate infant under sixteen takes and retains its father's settlement until it acquires another for itself when over the age of sixteen (*n*).

A child under sixteen cannot acquire for itself a settlement (*o*); but when it has reached the age of sixteen or period of emancipation, for the purpose of acquiring a settlement it

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(*i*) See *post*, chap. VI.

(*k*) Dicey, Dom. 96; *Udny* v. *Udny*, L. R. 1 Sc. App. 441. See 33 & 34 Vict. c. 14, s. 10 (sub-ss. 3, 4).

(*l*) Dicey, Dom. 97; *Somerville* v. *Somerville*, 5 Ves. 749 (a); *Sharpe* v. *Crispin*, L. R. 1 P. & D. 611; 38 L. J. P. M. & A. 17.

(*m*) 39 & 40 Vict. c. 61, s. 34.

(*n*) See *Guardians of Reigate Union* v. *Guardians of Croydon Union*, 14 App. Cas. 465; 59 L. J. Q. B. 29.

(*o*) *Guardians of Woolwich Union* v. *Fulham Guardians*, [1905] 2 K. B. 203; 74 L. J. K. B. 556.

can add to the period for irremovability over sixteen the necessary period for irremovability under sixteen (*p*).

The domicil of an infant whose father is dead is, during the lifetime of the infant's mother, the same as, and changes with, the domicil of the mother (*q*). Thus, if after the death of the father, an unmarried infant lives with its mother, and the mother acquires a new domicil, it is communicated to the infant (*r*). This capacity of the mother to change her infant child's domicil is subject to certain exceptions: (i) The domicil of the infant is not changed by the marriage of its mother, so that its domicil should follow that of its stepfather (*s*). But this may be considered too sweeping an assertion; and it may be held that a mother on her second marriage has power to change her infant children's domicil; but the change will not necessarily flow from the fact of her marriage, but as the result of the exercise by her of a power vested in her for the welfare of her infant children (*t*); therefore, if on her second marriage, which necessitates a change in her own domicil, she abstains from exercising such power, her children will retain the domicil they possessed at the date of her second marriage (*u*). One method of abstaining from exercising such power is by leaving the children, not for temporary purposes, in their original domicil (*x*). (ii) The change of an infant's home by a mother will not, if made with a fraudulent purpose, change the infant's domicil (*y*).

Domicil of Origin of Legitimated Child. In the case of a legitimated person, the domicil of origin is the domicil which his father had at the time of such person's birth (*z*); and this is so whether the domicil of the father was one acquired by his own choice, or was his domicil of origin (*a*). The domicil of a legitimated infant is, during the lifetime of his father, the

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(*p*) *Reg.* v. *Elvet*, 29 L. J. M. C. 17; *Guardians of Highworth and Swindon Union* v. *Guardians of Westbury-on-Severn Union*, 14 App. Cas. 465; 59 L. J. Q. B. 29; *Guardians of West Ham Union* v. *Guardians of Holbeach Union*, [1905] A. C. 450; 74 L. J. K. B. 868

(*q*) Dicey, Dom. 97; *Potinger* v. *Wightman*, 3 Mer. 67.

(*r*) *Johnstone* v. *Beattie*, 10 Cl. & F. 42; per Lord Campbell.

(*s*) *Ryall* v. *Kennedy*, 40 N. Y. (Supreme Court) 347. It is Mr. Dicey's opinion that this case would probably be followed by the English Courts.

(*t*) *Brown* v. *Lynch*, 2 Bradf. Surrog. Rep. (N. Y.) 214; *Re Beaumont*, [1893] 3 Ch. 490; 62 L. J. Ch. 923.

(*u*) *Re Beaumont* (*ubi sup.*).

(*x*) *Ibid.*

(*y*) This exception is not based on any express decision; but some foreign writers of authority support the contention. See *Potinger* v. *Wightman* (*ubi sup.*).

(*z*) Dicey, Dom. 96. *Udny* v. *Udny* (*ubi sup.*).

(*a*) *Re M'Creight, Paxton* v. *M'Creight*, 30 Ch. D. 165; 55 L. J. Ch. 28.

same as, and changes with, the domicil of his father (*b*), and if the father changes his domicil during the infancy of his child, the altered domicil does not, it would seem, become the domicil of origin of the infant child (*c*).

The domicil of the father at the birth of the *antenatus* has a most important effect upon the capacity of such *antenatus* to be legitimated. Thus, if the father's domicil at the birth of the *antenatus* happens to be in a country in which legitimation by after-marriage of parents is recognized, the *antenatus* will, on the after-marriage of his parents, become legitimated (*d*). But if the father's domicil at the birth of the *antenatus* be in a country in which legitimation by after-marriage is not recognized, the *antenatus* will always and for all purposes be held illegitimate, though his parents intermarry even in a country recognizing legitimation by such after-marriage (*e*).

Legitimacy Declarations.—In order to afford facilities to persons about whose legitimacy doubts might be entertained, an Act was passed in 1858, called "The Legitimacy Declaration Act" (*f*), the provisions of which are now incorporated in the Supreme Court of Judicature Act, 1925, by force of which any natural born subject of the Queen, or any person whose right to be deemed a natural born subject depends wholly or in part on his legitimacy, or on the validity of a marriage, may if he is domiciled in England or Ireland, or claims any real or personal estate situate in England, apply by a petition to the Court, praying the Court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother, or of his grandfather or grandmother, was a valid marriage, or that his own marriage was a valid marriage; and any person, being so domiciled or claiming as aforesaid, may apply to the Court for a decree declaring his right to be deemed a natural born subject of his Majesty. Applications for such decrees may be included in the same petition, and on any such application the Court shall make such decree as it thinks just; and such decree shall be binding to all intents and purposes, on her Majesty, and on all other persons whatsoever (*g*).

(*b*) Dicey, Dom. 97. *Somerville* v. *Somerville* (*ubi sup.*); *Sharpe* v. *Crispin* (*ubi sup.*).

(*c*) Per Chitty, J., in *Re Craignish*, *Craignish* v. *Hewett*, [1892] 3 Ch. 180; 61 L. J. Ch. 549.

(*d*) *Munro* v. *Munro*, 7 Cl. & F. 842.

(*e*) *Shedden* v. *Patrick*, 1 Macq. H. L. Cas. 535; *Strathmore Peerage Case*, 4 Wils. & Sh. Appdx. 5, 89; *Ross* v. *Ross*, May 15, 1827, reversed July 16, 1830, 4 Wils & Sh. 289; *Re Goodman's Trust*, 17 Ch. D. 266; 50 L. J. Ch. 425.

(*f*) 21 & 22 Vict. c. 93.

(*g*) Supreme Court of Judicature Act, 1925, s. 188, sub-s. 1, 2, 3. Sect. 1. By

The validity of a marriage celebrated abroad may be the subject-matter of a petition under this Act (*h*), and should not as a rule be the subject-matter of an action to perpetuate testimony (*i*).

Object of the Acts. - The object of these Acts is strictly to obtain a declaration of legitimacy of the petitioner, and not to enable others to bastardize him (*k*). The Court will not entertain a petition which is practically for a nullity of marriage (*l*), or investigate or decide upon a claim to a title of honour (*m*), nor will it declare that the petitioner is heir-at-law to another, or that some third person is illegitimate (*n*).

Procedure.—If the petitioner is an infant, his guardian must be one who has no interest in his being declared illegitimate (*o*). A prayer for a declaration of legitimacy will not be allowed to be joined in an action for probate (*p*). The father will not be allowed to give evidence of non-access so as to bastardize his issue (*q*).

In proceedings under this Act the Attorney-General must first be cited; then the parties on applying to have the case set down for trial must lay the state of the case by affidavit or otherwise before the Registrar, who will direct whether any, and if so, what other parties shall be cited to see proceedings (*r*). A person not cited, who has no real interest in opposing the petition for a declaration of legitimacy, will not be allowed to intervene (*s*). The Court has jurisdiction to order a person who has been cited and has appeared and opposed the petition to pay the costs of the petitioner, but not those of the Attorney-General (*t*).

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sub-sect. 4 the Attorney-General is to be made respondent in the proceedings. By sect. 5 the Court may cite other persons than the Attorney-General, and by sect. 3 (ii) the rights of persons not cited are saved.

(*h*) *Gardner* v. *Att.-Gen.*, 60 L. T. 839 (Gretna Green marriage).

(*i*) *West* v. *Lord Sackville*, [1903] 2 Ch. 378; 72 L. J. Ch. 649.

(*k*) *Re Chaplin*, L. R. 1 P. & D. 328; 36 L. J. P. M. & A. 90.

(*l*) *Johnstone* v. *Att.-Gen.*, 43 L. J. P. M. & A. 3.

(*m*) *Frederick* v. *Att.-Gen.*, L. R. 3 P. & D. 196; 43 L. J. P. M. & A. 32.

(*n*) *Mansel* v. *Att.-Gen.*, 2 P. D. 265; 46 L. J. P. D. & A. 64.

(*o*) *Re Chaplin* (*ubi sup.*).

(*p*) *Warter* v. *Warter*, 15 P. D. 35; 59 L. J. P. 45.

(*q*) See *Guardians of the Nottingham Union* v. *Tomkinson*, 4 C. P. D. 343; 48 L. J. M. C. 171.

(*r*) *Brinkley* v. *Att.-Gen.*, 15 P. D. 76; 59 L. J. P. 51. This practice is to be followed in proceedings under the Greek Marriages Act, 1884 (47 & 48 Vict. c. 20). *Scaramanga* v. *Att.-Gen.*, 14 P. D. 83; 58 L. J. P. 53.

(*s*) *Upton* v. *Att.-Gen.*, 32 L. J. P. M. & A. 177.

(*t*) *Bain* v. *Att.-Gen.*, [1892] P. 217, 261; 61 L. J. P. 135.

CHAPTER II.

RIGHTS AND OBLIGATIONS OF PARENTS IN RESPECT OF THE PERSONS OF CHILDREN.

SECTION I.

Right of Parents to Custody and Control.

THE relationship of parent and child is that of a guardian and his ward; it is a strong and powerful tie. A proper regard for, nay, the sanctity of, this tie is necessary for the cohesion of States as well as of families. It is a natural instinct which impels those who have brought children into the world to shield, nourish, and support them till their early weakness has been changed into mature strength. It is this instinct which has ever assigned children, equally with the other weaker members, to the care and protection of the head of the family, whether their father or their paternal grandfather. The right of the father to the custody of the children was due to his superior position in the family household; he was the strongest person, and could best assert his right to their custody, and he won the means of their support; thus. many reasons combined to assign to him the arbitrament of their destinies.

The power of the English father over his children was never so wide or tyrannous as the *patria potestas* of the Roman father. "The power of a parent by our English laws, though much more moderate, is still sufficient to keep the child in order and obedience; and it is laid down that a father may lawfully correct him, being under age, in a reasonable manner; for this is for the benefit of his education" (*a*). This right of lawful correction is jealously watched by the Courts, and if the parent exceed the bounds of moderation and inflict cruel punishment upon the child, he may be severely punished; if the child in consequence lose its life, he may have to stand his trial for its murder (*b*). The American law on this branch of the subject is practically the same as the English (*c*).

(*a*) 1 Bl. Com. 452. (*b*) See *Reg.* v. *Coude*, 10 Cox, C. C. 547.
(*c*) Sch. Dom. Rel. s. 245.

Natural Guardian.—In popular language, the father or mother is the "natural guardian" of their children; but according to the strict common law meaning, the term "guardian by nature" applied primarily to the father of an heir apparent (*d*); and this feudal guardianship terminated when the heir (whether male or female) attained the age of fourteen. But this strict common law meaning has for a long period been merged in the wider and more popular sense of the term "natural guardian," namely, that nature marks out the parent as being the rightful person to have the control and custody of his child (*e*).

The control of the parent (father or mother) lasts under ordinary circumstances until, and in all cases ends when, the child attains the age of twenty-one, or marries under that age (*f*); and a parent cannot appoint by will a guardian for a child to continue after the latter has attained his majority (*g*). But if, as will be seen more particularly lower down (*h*), any dispute arise as to who should retain the custody and control of the child, and the child has attained the age of discretion—not less than fourteen years for a boy and sixteen for a girl (*i*)—the Court may, if it think fit, allow him to exercise a discretion and withdraw himself from the control of his parent. It seems, however, indisputable that, unless interfered with by the Courts, the *patria potestas* may be exercised by way of legitimate control over infant children; but that on attaining majority they become emancipated. But this control is not unlimited; thus a parent has no common law right to bind a child as an apprentice (*k*); but the child itself must execute the deed (*l*).

Control over Child's Marriage.—The control of a parent over its infant child's marriage is clearly established by legislative sanction in the various Marriage Acts (*m*), and in the Guardianship of Infants Act, 1925 (*n*). The control is exercised by granting or withholding consent. It is enough here (*o*) to say

(*d*) The mother and other ancestors could be guardians.
(*e*) Co. Litt. 88 *b*, Harg. notes, 12, 13. See *post*, Part III., ch. ii.
(*f*) 1 Bl. Com. 453; Co. Litt. 88 *b*, Harg.; Forsyth, Cust. Inf. s. 5; *Re Agar-Ellis, Agar-Ellis* v. *Lascelles*, 24 Ch. D. 317; 53 L. J. Ch. 10.
(*g*) 15 & 16 Geo. V. c. 45, s. 5.
(*h*) *Post*, pp. 497, 498.
(*i*) *Reg.* v. *Howes*, 30 L. J. M. C. 47; S. C. 3 L. T. 467; *Mallinson* v. *Mallinson*, 1 P. & D. 221; 35 L. J. P. M. & A. 84.
(*k*) *Rex* v. *Annesley*, 3 B. & Ald. 584.
(*l*) *Ibid.*; *St. Nicholas* v. *St. Botolph*, 31 L. J. M. C. 258.
(*m*) 4 Geo. IV. c. 76; 7 Wm. IV. and 1 Vict. c. 22; 3 & 4 Vict. c. 72; 19 & 20 Vict. c. 119.
(*n*) 15 & 16 Geo. V. c. 45.
(*o*) For more ample discussion of this subject, see *ante*, Part I., Husband and Wife, chap. iv.

that such consent must be honestly given, and no private advantage to the parent or guardian arising out of the marriage will have effect given to it (*p*). A parent or person *in loco parentis* may withdraw his consent; but such retractation must be honestly and not capriciously made (*q*).

Common Law Right of Father to Custody.—By the common law of England the father had the right to the custody of his infant children as against third parties, and even as against the mother (*r*), though the child were an infant at the breast (*s*). The law gave him the custody of his children unless he did something to forfeit it (*t*). If, however, he agreed to let the mother have access to the child, he was held bound by his agreement (*u*). This right of the father enabled him to delegate his authority over the child to a third person (*x*), as to a tutor or schoolmaster, who, as against all the world, the father himself excepted, stood *in loco parentis* to the child committed to his charge and custody (*y*). The ante-nuptial contract of a father to give up the children of the intended marriage into the control of their mother is deemed to be against public policy, and will not be enforced by the Courts (*z*). Such contracts and stipulations to be executed in the future are bad, for they not only discount the future, but are mischievous in their operation on family life (*a*). But the father on separating from his wife can enter into an arrangement with her to have the custody of his child or children (*b*).

Right of the Mother. During the lifetime of the father a mother, as such, was entitled to no power, but only to reverence and respect (*c*); but on the death of the father, without having

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(*p*) *Hamilton* v. *Mohun*, 2 Vern. 652. See Marriage Brocage Contracts, p. 13.

(*q*) *Re Brown, Ingall* v. *Brown*, [1904] 1 Ch. 120; 73 L. J. Ch. 130.

(*r*) *Ex parte Skinner*, 9 Moo. 278; *Ex parte Hopkins*, 3 P. Wms. 154. "The law makes the father the guardian of his children by nature and nurture."—Per Lord Eldon in *Wellesley* v. *Duke of Beaufort*, 2 Russ. 1, 21; *Constable* v. *Constable*, 24 W. R. 649.

(*s*) *Rex* v. *De Manneville*, 5 East, 221; *Re Thomas*, 22 L. J. Ch. 1075; *Ex parte Young*, 26 L. T. 92; see also *Cartledge* v. *Cartledge*, 31 L. J. P. M. & A. 85.

(*t*) *Hunt* v. *Hunt*, 28 Ch. D. 606.

(*u*) See *Ex parte Lytton* (decided by Lord Mansfield), cited in *Rex* v. *De Manneville* (*ubi sup.*).

(*x*) *Ex parte M'Clellan*, 1 Dowl. 81.

(*y*) See *Re Suttor*, 2 Fost. and Fin. 267.

(*z*) *Re Agar-Ellis, Agar-Ellis* v. *Lascelles*, 10 Ch. D. 49; 48 L. J. Ch. 1.

(*a*) *Vansittart* v. *Vansittart*, 27 L. J. Ch. 290.

(*b*) 36 Vict. c. 12, s. 2. See *post*, p. 508.

(*c*) 1 Bl. Com. 453. Under the law of Rome a mother, though entitled to respect, had even fewer privileges than an English mother had up to quite lately; thus, she was not her children's legal natural guardian on the death of their father, nor could she be legally appointed their guardian by will. Cod. viii. tit. 47, s. 4; Dig. xxvi. tit. 2, s. 26.

appointed a testamentary guardian (*d*), she was entitled to the custody of her infant children, and in this respect was altogether in the place of the father, with all his rights and responsibilities, for she is their guardian by nature and nurture (*e*); but where a testamentary guardian had been appointed, a mother, as such, had no right to interfere with him (*f*), nor with a guardian appointed by the Court of Chancery (*g*). A mother had even as against the father a statutory right to the custody of her child under the Divorce Acts (*h*), and the Infants' Custody Act, 1873 (*i*), where it was manifestly for the child's benefit that she and not the father should have the care and control of it. Under the Guardianship of Infants Act, 1886 (*k*), the mother might apply to the Court for an order regarding the custody of her infant child, and the right of access thereto of either parent, the Court having regard to the welfare of the infant and to the conduct of the parents, and to her wishes as well as those of the father; and having power to make an order respecting the costs of the mother and the liability of the father for the same or otherwise (*l*).

Under the Guardianship of Infants Act, 1886, a mother had certain co-ordinate rights of guardianship with the father of her infant children; thus, where the mother survived the father, who had appointed no guardians, she was sole guardian; or if he appointed a guardian or guardians she had the right to be joint guardian with him or them (*m*); and she might by deed or will appoint a guardian to act after the death of herself and the father of her infant children, or to act jointly with the father if he survived her and was for any reason shown to be unfit to be the sole guardian of his children (*n*).

Guardianship of Infants Act, 1925.—The new Act amending the law as to the guardianship, custody and marriage of infants recites that Parliament, by the Sex Disqualification (Removal) Act, 1919 (*o*), and various other enactments, has sought to

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(*d*) 12 Car. II. c. 24. See *post*, Part III., Guardian and Ward, chap. ii.

(*e*) *Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. 103; 2 W. & T. L. C. 633; *Villareal* v. *Mellish*, 2 Swanst. 533; *Roach* v. *Garvan*, 1 Ves. Sen. 158; *Re Race*, 26 L. J. Q. B. 167; S. C. 7 El. & Bl. 186.

(*f*) *Reynolds* v. *Teynham*, 9 Mod. 40.

(*g*) See *Waine* v. *Waine*, cited Chamb. Inf. 36.

(*h*) 20 & 21 Vict. c. 85, s. 35; 22 & 23 Vict. c. 61, s. 4; 58 & 59 Vict. c. 39, s. 5 (b), repealing 41 Vict. c. 19, s. 4.

(*i*) 36 & 37 Vict. c. 12. See *post*, p. 617.

(*k*) 49 & 50 Vict. c. 27. (*l*) Sect. 5.

(*m*) 49 & 50 Vict. c. 27, s. 2.

(*n*) Sect. 3. See *post*, p. 617.

(*o*) 9 & 10 Geo. V. c. 71.

establish equality in law between the sexes, and that it is expedient that this principle should obtain with respect to the guardianship of infants and the rights and responsibilities conferred thereby; and enacts that where in any proceeding before any Court (including now a County Court and a court of summary jurisdiction) the custody or upbringing of an infant, or the administration of any property of the infant or the application of the income thereof is in question, the Court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration from any other point of view whether the claim of the father, or any right of common law possessed by the father, in respect of such custody, upbringing, administration, or application is superior to that of the mother, or the claim of the mother is superior to that of the father (*p*). The mother is to have a right equal to that of the father to apply to the Court in respect of any matter affecting the infant. The power of the Court under section 5 of the Guardianship of Infants Act, 1886 (*q*), to make an order as to custody or access may be exercised notwithstanding that the mother is then residing with the father (*r*), and where the Court makes an order in favour of the mother then, whether or not the mother is then residing with the father, the Court may order the father to pay the mother such sum towards the maintenance of the child as it thinks reasonable, having regard to the means of the father (*s*). No order is enforceable while the joint residence continues, and it ceases to have effect after three months if joint residence continues (*t*). The order may be varied or discharged on the application of the father or mother (*u*).

Removal of Mother.—After the father's death the mother's right to the guardianship of her child was incontestable, and would not be interfered with by the Court, except on grounds affecting the interest and welfare of the child (*x*).

The grounds for superseding her guardianship were improper conduct, such as trying to bring about an unsuitable marriage of her child, a ward of court (*y*), unfitness for her duties (*z*),

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(*p*) 15 & 16 Geo. V. c. 45, s. 1.
(*q*) 49 & 50 Vict. c. 27, s. 5.
(*r*) Sect. 3 (1).
(*s*) Sect. 3 (2).
(*t*) Sect. 3 (3).
(*u*) Sect. 3 (4).
(*x*) *Re X., X.* v. *Y.*, [1899] 1 Ch. 526; 68 L. J. Ch. 265.
(*y*) *Roach* v. *Garvan* (*ubi sup.*).
(*z*) *Heysham* v. *Heysham*, 1 Cox, Eq. Cas. 179.

immorality (*a*), or disobedience to the decrees and orders of the Court of Chancery (*b*).

Relinquishment of Control by Parents.—Parents cannot enter into a legal binding agreement to deprive themselves of the custody and control of their children; and if they elect to do so, can at any moment resume their control over their children (*c*). As it has been put in the House of Lords, the father is the natural guardian, the guardianship is in the nature of a sacred trust, and the father cannot substitute another person for himself in his lifetime, in this respect the English and the Hindu law being alike (*d*). If, however, as a matter of fact, parents do relinquish their control (whether in pursuance of an agreement or not), and allow others to take charge of and rear them, they will not be permitted, at the hazard of injuring the children, to take them back into their own custody. The interests of the children are the sole guide to the Court as to what orders should be made; if the restoration to their parents' custody would be of manifest advantage to the children, those in charge will be ordered to deliver them up to the parents, but not otherwise (*e*).

Forfeiture of Right of Control.—The right of the parents to the custody of their children can only be determined by the children arriving at majority, or by parental conduct which brings about a forfeiture of their privileges; thus, it cannot legally be infringed by the appointment by a stranger of a guardian to them during the father's lifetime (*f*); yet a father may so act as to render such appointment effectual; thus, where a benefit is given to a father on condition of his resigning the management of his children, he will not be permitted to receive the gift without complying with the terms of it, and on his submission a person will be appointed to act as guardian, although the mere acceptance of the gift by the father will not be considered as an election to abide by the will, and to waive his parental right, unless he knows that he is making the election (*g*).

Adoption.—The law of England, strictly speaking, knows

(*a*) *Re Moore*, 11 Ir. C. L. 1.

(*b*) *Re Newbery*, L. R. 1 Ch. App. 263; 35 L. J. Ch. 330.

(*c*) *Reg.* v. *Barnardo* (*Tye's Case*), 23 Q. B. D. 305; 58 L. J. Q. B. 553; *Reg.* v. *Barnardo* (*Gossage's Case*), 24 Q. B. D. 283; 59 L. J. Q. B. 345.

(*d*) *Besant* v. *Narayaniah and others*, 30 T. L. R. 560.

(*e*) See *Reg.* v. *Gyngall*, [1893] 2 Q. B. 232; 62 L. J. Q. B. 559.

(*f*) *Ex parte Hopkins*, 3 P. Wms. 152. The appointment of such a guardian is in law inoperative.

(*g*) Mach. Inf. 135; *Colston* v. *Morris*, Jac. 257 *n*; see also *Powell* v. *Cleaver*, 2 Bro. C. C. 500.

nothing of adoption, and does not recognize any rights, claims, or duties arising out of such a relation except as arising out of an express or implied contract. But in so far as the Court of Chancery will, in the interests of the children, enforce the waiver or abandonment of the control of the father (or mother), up to that point it might be said to countenance the claim of the adoptive parent, not on the ground of any right in the latter, but of the material well-being of the infant (*h*).

How Right of Parent to Custody of Child Enforced.—This right of the father and the mother to the custody of their children is not only recognized, but if infringed, may be enforced by legal process. There are now two remedies open to them. (1) Writ of *habeas corpus*, and (2) Application to the Court of Chancery.

Habeas Corpus.—The issue of a writ of *habeas corpus* proceeds on the fact of an illegal restraint, and the person entitled to the legal custody of the infant, whether the father, mother (*i*), or other guardian (*k*), may sue out this writ without making any previous demand for the possession of the child (*l*). If the custody is found to be illegal, and the applicant is entitled to it, the Court will make an order to that effect; but if neither the applicant nor the custodian is entitled to the custody, the writ will not be confirmed; the Court will either restore the infant to the custody from which it was taken, or discharge it from that custody, with liberty to return to it. Where the legal custody of the infant is shown to exist, the Court must order it to be delivered over to or remain in that custody (*m*). Though the father has at common law *prima facie* the right to the custody of his child, and so is entitled to his writ of *habeas corpus*, yet since the Judicature Act, 1873 (which provides that the rules of equity in relation to the custody of infants shall prevail), and the Infants' Custody Act, 1873 (*n*), the Court has a discretion to refuse the father this writ in order to remove a child of tender years from the custody of the mother,

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(*h*) Adoption played an important part in Roman family life; and many laws were enacted in reference to and in regulation of it. It is to be found in those European systems which have made the law of Rome the basis of their codes.

(*i*) *Reg.* v. *Barnardo* (*Tye's Case*), 23 Q. B. D. 305; 58 L. J. Q. B. 553.

(*k*) *Rex* v. *Greenhill*, 4 A. & E. 624. In this case Coleridge, J., lays down the principle on which the Courts acted in handing over to the parent or guardian an infant too young to make a choice as to its custody. *Re Hakewill*, 12 C. B. 223; *Reg.* v. *Howes*, 30 L. J. M. C. 47; *Re Andrews*, L. R. 8 Q. B. 153; S. C. 42 L. J. Q. B. 99.

(*l*) *Ex parte Witte*, 13 C. B. 680.

(*m*) *Rex* v. *Isley*, 5 A. & E. 441.

(*n*) 36 & 37 Vict. c. 12, s. 1.

and other relations whose conduct with regard to the child is unimpeached (*o*). The writ is directed to the person who detains another in custody, and orders him to produce the body of such person, with the day and cause of taking and detaining him (*p*). This writ was suable not only out of the common law Courts but also out of Chancery (*q*), and in the latter instance the equity judges exercised the functions of common law judges, and were limited by the powers and jurisdiction conferred on the latter (*r*). The jurisdiction of both the common law and Chancery judges on *habeas corpus*, so far as the subject-matter under discussion is concerned, is in strict law practically confined to the inquiry as to the legal right of the father, or other guardian, including the mother, to the custody of the child, and to whether the child is in illegal custody without its consent, provided it has attained a certain age. It is no valid excuse for not producing a child in obedience to a writ of *habeas corpus* to state inability to obey, if such inability is the result of illegal conduct antecedent to the issuing of the writ on the part of the person to whom the writ is addressed, and it is not impossible to produce the body of the child (*s*). If a person to whom the custody of a child has been traced has handed over the child to some other person in order to avoid the exigence of a writ of *habeas corpus*, yet if on the issue of the writ the child was likely to be produced, then the writ ought to go (*t*).

The common law Courts could not, except in flagrant instances of unfitness, control the exercise by the father or the guardian of his legal rights, and refuse the writ (*u*). On the other hand, where a cause dealing with the infant's property was before the

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(*o*) *Re Brown* (*Ethel*), 13 Q. B. D. 614.

(*p*) Tidd, Pr. 348.

(*q*) "The like writ (*habeas corpus*) is to be granted out of the Court of Chancery, either in the term (as in the King's Bench), or in the vacation; for the Court of Chancery is *officina justitiæ*, and is ever open, and never adjourned, so as the subject, being wrongfully imprisoned, may have justice for the liberty of his person, as well in the vacation time as in the term."—Co. 2 Inst. 55.

(*r*) *Crowley's Case*, 2 Swanst. 1, 73, 75; see also *Re Agar-Ellis*, *Agar-Ellis* v. *Lascelles*, 24 Ch. D. 317; 53 L. J. Ch. 10.

(*s*) *Reg.* v. *Barnardo* (*Tye's Case*), 23 Q. B. D. 305; 58 L. J. Q. B. 553; *Re Matthews*, 12 Ir. C. L. Rep. 233; and per Esher, M.R., in *Reg.* v. *Barnardo* (*Gossage's Case*), 24 Q. B. D. 283; 59 L. J. Q. B. 345.

(*t*) Per Fry, L.J., in *Reg.* v. *Barnardo* (*Gossage's Case*) (*ubi sup.*).

(*u*) *Re Andrews*, L. R. 8 Q. B. 153; 42 L. J. Q. B. 99. Personal cruelty towards a child, or manifest injury towards the child's prospects, were really the only grounds on which the common law Courts could deprive the father of the custody of his child. See the cases of *Rex* v. *Greenhill*, 4 A. & E. 624, and *Ex parte Skinner*, 9 Moo. 278, where, though the father was of bad character, he was allowed to resume the control of his child, and *Rex* v. *De Manneville*, 5 East, 221; *Rex* v. *Delaval*, 3 Burr. 1436; and *Reg.* v. *Clarke*, 7 El. & Bl. 186; S. C. 26 L. J. Q. B. 169.

Court of Chancery, that is, where the infant was a ward of Court, then other considerations than the mere legal right of custody were acted upon, and the custody of the infant might in the discretion of the Court be assigned to one who had no legal right to it (*x*). Since the passing of the Judicature Act (*y*), the principles to be applied in dealing with the question of the custody of infants by the King's Bench and Chancery Divisions are those of equity, and the jurisdiction of both divisions is concurrent (*z*). But where the question was simply as to the legality or illegality of the detention of the child, the jurisdiction and power of the Court of Chancery were identical with those of the common law Courts (*a*). But the Court of Chancery allowed itself greater latitude in protecting the interests of the children than did the common law Courts; and by the Custody of Children Act, 1891 (*b*), both Chancery and Common Law Divisions of the High Court are to administer equitable principles in exercising their jurisdiction in *habeas corpus*.

Application to the Court of Chancery.—The parent may obtain relief by application to the Court of Chancery, either by suing out a writ of *habeas corpus* (*c*), which may issue in vacation time (*d*), or by petition (*e*), whether a cause affecting the infant is pending or not (*f*).

Where there is no cause pending, in order to give the Court more complete power, the infant should be made a ward of court by the parent or some other person constituting himself or herself a trustee for the infant by paying a sum of money (a small amount will suffice) into Court, and making an application by summons at chambers for the appointment of a guardian (*g*). A parent who thus constitutes a child a ward of Court does not thereby surrender his or her right of control over the child (*h*). Where the infants are wards in Chancery, the Court may order them to be delivered up to their guardian, either to remain where they were (*i*), or to go at liberty (*k*).

(*x*) See *Wellesley* v. *Duke of Beaufort*, 2 Russ. 1; and *Andrews* v. *Salt*, L. R. 8 Ch. App. 622.
(*y*) 36 & 37 Vict. c. 66, ss. 16, 25, sub-s. 10.
(*z*) *Re Goldsworthy*, 2 Q. B. D. 75; 46 L. J. Q. B. 187.
(*a*) Per Brett, M.R., in *Re Agar-Ellis*, *Agar-Ellis* v. *Lascelles*, 24 Ch. D. 317, 327; 53 L. J. Ch. 10.
(*b*) 54 Vict. c. 3. See *post*, p. 511.
(*c*) *Re Spence*, 2 Ph. 247.
(*d*) *Crowley's Case*, 2 Swanst. 1.
(*e*) *Lyons* v. *Blenkin*, Jac. 245.
(*f*) *Re Spence* (*ubi sup.*).
(*g*) *Re Esther Lyons*, 22 L. T. 770.
(*h*) *Per cur.* in *Re Agar-Ellis*, *Agar-Ellis* v. *Lascelles* (*ubi sup.*).
(*i*) *Harrison* v. *Goodall*, Kay, 310, *n.*
(*k*) *Re Esther Lyons* (*ubi sup.*).

There were advantages in applying to the Court of Chancery over proceedings by writ of *habeas corpus*. In proceedings by the latter, the mere question of the illegal custody of the child could only be considered, whereas if the infant was made a ward of Court, the Court had power to inquire into all the surrounding circumstances of the case, the claim of the applicant to the custody, and the interests of the ward. The Court of Chancery also has the power of summoning witnesses whom it has reason to believe are aware of the whereabouts of the infant who is its ward, and can compel them to disclose their knowledge. If, therefore, there is any doubt or uncertainty as to where the infant is detained out of the custody of the claimant, the most efficacious step is to make it a ward of Court, and apply to the Court for the appointment of a guardian to it.

General Right of Parents to Control and Custody.—The father, and the mother after his death, have by the law of England, a general right of control over the person, education, and conduct of their children till they attain majority (*l*), and when they come before the Court on *habeas corpus*, or an application in Chancery, if not yet arrived at the years of discretion, the Court will order them to be delivered without examination into the custody and control of their parents or other guardian. The Courts on *habeas corpus* act upon the presumption that where the legal custody is, no restraint exists; but they have a discretion to refuse to restore the infant to the custody of its parent, if the parent's conduct is grossly immoral (*m*), or if to surrender it up would be to the detriment of the interests of the child (*n*); and, where the child is in the hands of a third person, the presumption is in favour of the father or legal guardian (*o*). But where the children are not in the custody of their father or guardian, and he seeks to resume his control by *habeas corpus*, in cases where they are arrived at the age of discretion, and are capable of exercising a choice, they will be permitted to elect whether or not to return to their father's or guardian's control, but their choice must be a wise one and for their own interests (*p*). This is so because the question before the

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(*l*) *Re Agar-Ellis, Agar-Ellis* v. *Lascelles* (*ubi sup.*).
(*m*) *Rex* v. *De Manneville*, 5 East, 221.
(*n*) See *Reg.* v. *Clarke*, 7 El. & Bl. 186; S. C. 26 L. J. Q. B. 167.
(*o*) Macph. Inf. 155.
(*p*) *Reg.* v. *Howes*, 30 L. J. M. C. 47. Thus, if a girl over sixteen, but under twenty-one, were voluntarily to consent to remain in a brothel, there is no doubt but that the father would be assisted by the Court to resume his parental control over her.

Court upon *habeas corpus* is whether the person detained is in illegal custody without that person's consent; and where the Court finds that the infant is no longer a mere child, but is capable of consenting, and is consenting to the place where it is detained, then the ground of an application for a writ of *habeas corpus* falls away (*q*).

Custody of Children Act, 1891.—But under the Custody of Children Act, 1891 (*r*), the powers of the Court, on an application for a writ of *habeas corpus*, are enlarged, and the principles which guided the Court of Chancery in refusing to grant the writ have now statutory authority; for where a parent (*s*) of a child applies to the High Court for a writ for its production, and the Court is of opinion that the parent has abandoned or deserted the child, or has otherwise so conducted himself that the Court should refuse to enforce his right to the custody, the Court may decline to issue the writ (*t*). So, too, if the child is being brought up by another person (*u*), or is boarded out by poor-law guardians, the Court may make an order on the parent, if it restores the custody of the child, to pay such remuneration to the person or board for the keep of the child as may be just (*x*). Where a parent has abandoned or deserted his child, or allowed his child to be brought up at some other person's expense, or by poor-law guardians, for such a length of time as to satisfy the Court that the parent was unmindful of his parental duties, the Court may refuse to order up the child to the parent unless the latter proves he is a fit person to have the custody of the child (*y*). If the Court is of opinion that the parent ought not to have the custody of the child, and that the child is being brought up in a different religion from that in which the parent has a legal right to require the child to be brought up, the Court may, by order, secure that the child be brought up in such religion (*z*). The Court may consult the wishes of the child in considering what order ought to be made, and any right which the child now possesses to exercise its own free choice shall not be diminished (*a*).

(*q*) Per Brett, M.R., in *Re Agar-Ellis, Agar-Ellis* v. *Lascelles*, 24 Ch. D. 317; 53 L. J. Ch. 10.
(*r*) 54 Vict. c. 3.
(*s*) "Parent" is any person liable at law to maintain such child or entitled to its custody. Sect. 5.
(*t*) Sect. 1.
(*u*) "Person" includes any school or institution. Sect. 5.
(*x*) Sect. 2. (*y*) Sect. 3.
(*z*) Sect. 4.
(*a*) *Ibid.*

Age of Discretion. There is no English case deciding what is the age of discretion for this purpose in male infants, but two Irish cases (*b*) have fixed fourteen. In the case of female infants, the Courts (guided by the statutes of 4 & 5 Ph. & M. c. 8, and 24 & 25 Vict. c. 100, s. 55) have fixed sixteen as the earliest age at which they will be allowed to exercise this choice, and no amount of precocity in a girl under that age will hasten the period of choice (*c*). But apart from the question of *habeas corpus*, the parents' right to the custody and control of their children of both sexes lasts till they have attained their majority, unless they have done something to disentitle them to that right (*d*); for parents have the right to control the marriages of their infant children (*e*); and to appoint guardians to them till they reach majority (*f*). The Court of Divorce has recognized the liability of parents to maintain and support their children till they reach the age of twenty-one (*g*).

Section 2.

Interference by the Courts with Parental Control.

The common law right of the parents to the control and custody of their children has not been allowed to prevail under all circumstances, but has been seriously interfered with both by the Courts administering common law as well as those administering equity, where the interests of the children have called for interference. The Court of Chancery has from time to time exercised the widest powers of interference on behalf of infants who stood in need of its protection. The common law Courts, exercising only their innate jurisdiction, could control the rights of the parents only in cases where they were proved to be absolutely unfit to take care of them. But to a considerable extent, however, the same reasons prevailed with

(*b*) *Re Shanahan*, 20 L. T. 183; *Re Connor*, 16 Ir. C. L. 112. The age of fourteen for boys might be adopted on the analogy of the capacity of male infants to choose guardians in socage at that age; for on arriving at that age they were assumed able to exercise a wise and proper discretion.

(*c*) *Reg.* v. *Howes*, 30 L. J. M. C. 47; *Re Smythe*, 11 Ir. L. T. Rep. 122; but see *Reg.* v. *Gyngall*, [1893] 2 Q. B. 232; 62 L. J. Q. B. 559, where the girl was fifteen and not quite sixteen.

(*d*) *Re Agar-Ellis, Agar-Ellis* v. *Lascelles*, 24 Ch. D. 317; 53 L. J. Ch. 10; *Thomasset* v. *Thomasset*, [1894] P. 295; 63 L. J. P. 140; *Re Esther Lyons*, 22 L. T. 770.

(*e*) 15 & 16 Geo. V. c. 45, s. 9.

(*f*) 12 Car. II. c. 24; 49 & 50 Vict. c. 27; 15 & 16 Geo. V. c. 45.

(*g*) See *Thomasset* v. *Thomasset* (*ubi sup.*).

those administering the different branches of the law. The Court of Chancery was enabled to exercise wider supervision, because it possessed the delegated powers and jurisdiction of the Crown, as *parens patriæ*, in which was vested a general superintendence and protection over the persons of infants (*h*). The Court of Chancery exercises a general superintendence over infants, but as a rule has not the means of acting, except where it has property to act upon. It is not, however, from any want of jurisdiction that it does not act, but, as a rule, from a want of means to exercise its jurisdiction by applying property for the use and maintenance of the infants (*i*). Since the passing of the Judicature Act (*k*), and the decision of the Queen's Bench Division in *Re Goldsworthy* (*l*), it is no longer necessary to set out minutely the different grounds for interference with the parents' right of custody and control which were acted upon in equity and at common law. The principles upon which the Court, whether of common law or equity, professes now to act in regulating the relations of parent and child are those that ought to be found in a "wise, affectionate, and careful parent" (*m*); and the moral welfare of the child is the dominant matter for the consideration of the Court; "the Court shall regard the welfare of the infant as the first and paramount consideration" (*n*), and the Court will act whether the child is under the control of a parent or of some other legal guardian (*o*). Misconduct on the part of the parent is not now necessarily one of the grounds on which the Court will act to prevent a parent from recovering the custody of its offspring; but the Court has the right to say that if in its opinion the parent, however free from misconduct, is placed in a position that would warrant the Court in superseding the natural rights of the parent, it will not restore the custody of the child to him (*p*). The ideal of what is a "wise, affectionate, and careful

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(*h*) 2 Fonb. Eq. 224.

(*i*) Per Lord Eldon in *Wellesley* v. *Duke of Beaufort*, 2 Russ. 1; *Re Spence*, 2 Ph. 247; *Re Fynn*, 2 De G. & Sm. 457; *Brown* v. *Collins*, 25 Ch. D. 56; 53 L. J. Ch. 368; *Re Scanlan (Infants)*, 40 Ch. D. 200; 57 L. J. Ch. 718; *Re Nevin*, [1891] 2 Ch. 299; 60 L. J. Ch. 542; *Barnardo* v. *M'Hugh*, [1891] App. Cas. 388; *Re M'Grath (Infants)*, [1893] 1 Ch. 143; 62 L. J. Ch. 208. See *post*, Part IV. chap. v.

(*k*) 36 & 37 Vict. c. 66, ss. 16, 25, sub-s. 10.

(*l*) 2 Q. B. D. 75; 46 L. J. Q. B. 187.

(*m*) Per Esher, M.R., in *Reg.* v. *Gyngall*, [1893] 2 Q. B. 242; 62 L. J. Q. B. 559.

(*n*) 15 & 16 Geo. V. c. 45, s. 1.

(*o*) *Re M'Grath (Infants) (ubi sup.)*.

(*p*) *Reg.* v. *Gyngall (ubi sup.)*.

parent" may, however, vary from time to time with the composition of the Court which is to translate that ideal into practice; and it is possible for the Courts to vary widely in the application of that ideal.

This subject will be divided into:—

(1) Interference by the Court of Chancery—
  (a) Under its general jurisdiction.
  (b) Under its statutory jurisdiction.
(2) By the Divorce Court.
(3) By other Courts.

(1) Interference by the Court of Chancery.

(a) Under its General Jurisdiction.—The Court will not, as a rule, exercise this jurisdiction except in the case of its wards, however constituted, not because it lacks jurisdiction, but because it will not interfere as regards the custody and tuition of the children where it has not the means of providing for them (*q*). The jurisdiction of the Court is limited in such a case to the appointment and removal of guardians, for the children having no property under the control of the Court, the Court cannot provide any scheme for their maintenance or education (*r*). The grounds for interference by the Court are gross misconduct and profligacy on the part of the father, who, by his behaviour, has shown that he is utterly unfit to be trusted with the control and bringing up of his children, who, if they remain within his influence, are more likely to acquire evil habits than to learn what is proper and decent for civilized life (*s*). In deciding this question the Court regards less the interference and suspension of the parents' power than what is essential to the welfare of the children (*t*); and "welfare" is to be construed in the widest possible sense (*u*).

Grounds for Interference.—But the Court did not take upon itself jurisdiction to interfere simply with reference to what is not for the interests of the children (*x*). Thus, the following have been held to be grounds for interfering: Cruelty combined with general bad character (*y*), constant habits of drunkenness

(*q*) Per Cotton, L.J., in *Re Agar-Ellis*, *Agar-Ellis* v. *Lascelles*, 24 Ch. D. 317, 332; 53 L. J. Ch. 10.
(*r*) *Re M'Grath* (*Infants*) (*ubi sup.*).
(*s*) Story, Eq. Juris. s. 1341.
(*t*) See *Re Fynn* (*ubi sup.*).
(*u*) *Reg.* v. *Gyngall* (*ubi sup.*).
(*x*) *Curtis* v. *Curtis*, 28 L. J. Ch. 458.
(*y*) *Ex parte Warner*, 4 Bro. C. C. 101.

and blasphemy, poisoning the mind of the infant (*z*), cruelty to the children (*a*), or criminally assaulting a daughter (*b*), open habits of profligacy and debauchery, together with his teaching the children low and indecent language (*c*), irregularity of life combined with a second marriage with a person socially much beneath him (*d*). If the Court is satisfied that the father of young children has been guilty of an unnatural crime (though not convicted of it), it will not permit any sort of intercourse with his children, and it seems that if the children were with him it would be the duty of the Court to remove them (*e*). The Court need not wait (in order to found its jurisdiction) until misbehaviour has actually occurred, if it reasonably suspect that its occurrence is imminent, on the principle that "preventing-justice is better than punishing-justice" (*f*). Immoral conduct on the part of the mother tending to corrupt the characters of her children would be a ground for interfering with her rights; if a mother allows her daughter under the age of sixteen to be a prostitute in her own home, the child may be removed from her custody (*g*); or where having a trust to maintain and educate her children she does so maintain and educate them, but lives in a state of concubinage with her paramour (*h*).

The following facts have been held insufficient to warrant the Court to interfere with the paternal control: Mere incontinence (*i*), or occasional intemperance as opposed to habitual drunkenness (*k*); adultery where he is careful not to bring his children in contact with his paramour or mistress (*l*); occasional acts of harshness (*m*), or inconsiderate enforcement of his

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(*z*) Per Lord Eldon in *De Manneville* v. *De Manneville*, 10 Ves. 61. This was also done in the mother's case by Jessel, M.R., in *Carnegie's Case*, cited in *Re Besant*, 11 Ch. D. 508, 512; 48 L. J. Ch. 497.

(*a*) *Whitfield* v. *Hayes*, 12 Ves 492.

(*b*) *Swift* v. *Swift*, 11 Jur. (N.S.) 148, 458.

(*c*) *Wellesley* v. *Duke of Beaufort* (*ubi sup.*). This is the leading case on the subject and the principle upon which the Court acts are clearly laid down in it. *Re Goldsworthy*, 2 Q. B. D. 75; 46 L. J. Q. B. 187.

(*d*) *Re Cormicks* (*Minors*), 2 Ir. Eq. Rep. 264.

(*e*) *Anon.*, 2 Sim. Rep. (N.S.) 54.

(*f*) *Duke of Beaufort* v. *Berty*, 1 P. Wms. 703.

(*g*) *Hiscocks* v. *Jermonson*, 10 Q. B. D. 360; 52 L. J. M. C. 42.

(*h*) *Re G.* (*Infants*), [1899] 1 Ch. 719.

(*i*) *Re Goldsworthy* (*ubi sup.*).

(*k*) *Ibid.*; *Re Halliday's Estate*, 17 Jur. 56.

(*l*) *Ball* v. *Ball*, 2 Sim. 35; *March* v. *March and Palumbo*, L. R. 1 P. & D. 437; 36 L. J. P. M. & A. 65. But it is otherwise where the father, after obtaining a decree dissolving his marriage, is shown to be leading a notoriously dissolute life.

(*m*) *Blake* v. *Wallscourt*, 7 L. T. (O.S.) 545. But persistent spitefulness and cruelty on the part of the father would seem to be sufficient to give the Court

paternal rights or severity arising from giving way to a passionate temper (*n*); or his conduct, which prevents his wife living with him, but which does not lead to the corruption of the morals of his children (*o*). Again, mere poverty and insolvency by themselves are no grounds for interference (*p*); though, coupled with desertion (*q*), or an improper application of his child's fortune to his own use (*r*), they may be urged as reasons for putting an end to the father's control. There is no case in the books which decides that a father may be deprived of the control of his child because of his professing certain religious principles, though they might be described by the majority of people as peculiar (*s*). In all the cases in which the custody has been interfered with, the religious principles have manifested themselves in acts which have been stamped by the law as vicious and immoral (*t*). In *Lyons* v. *Blenkin* (*u*), Lord Eldon laid down the following general rule: "With the religious tenets of either party I have nothing to do, except so far as the law of the country calls upon me to look upon some religious opinions as dangerous to society." The nearest approach to an interference on this ground was in *Mrs. Besant's Case* (*x*).

Abdication of Parental Authority.—Another ground for interference by the Court is the abdication by the parent of parental authority in such a way that the Court will not allow the parent to interfere and resume it. Where a stranger thinks fit to provide a fund for the maintenance and education of children, and the parent permits their maintenance to be supplied from that source, allowing them to be brought up with expectations founded upon a particular species of maintenance and education, which he or she cannot afford to give, the parent is not, according to the principles of the Court of Chancery, at liberty to say that the children shall be taken from the course of education which

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occasion to remove the children. See *Re Agar-Ellis, Agar-Ellis* v. *Lascelles*, 24 Ch. D. 317; 53 L. J. Ch. 10.

(*n*) *Curtis* v. *Curtis*, 28 L. J. Ch. 458.

(*o*) *Re Spence*, 2 Ph. 247.

(*p*) *Curtis* v. *Curtis* (*ubi sup.*).

(*q*) *Creuze* v. *Hunter*, 2 Cox, Eq. Cas. 242.

(*r*) *Ex parte Mountford*, 15 Ves. 445.

(*s*) *Curtis* v. *Curtis* (*ubi sup.*). But see *Thomas* v. *Roberts*, 19 L. J. Ch. 506.

(*t*) *Shelley* v. *Westbrooke*, Jac. 266; *Thomas* v. *Roberts* (*ubi sup.*).

(*u*) Jac. 245.

(*x*) 11 Ch. D. 508; 48 L. J. Ch. 497. In this case Mrs. Besant had the custody of her daughter under a deed of separation; she professed no religious principles, and prevented her daughter from being educated in any. She was convicted of having published a book calculated to deprave public morals, and on this ground and on that of refusing to educate her child in religious principles, the Court removed the child from her custody.

they have hitherto pursued (*y*). In such a case the interests of the children being at stake, the Court will not hesitate to interfere on their behalf, and will consider that as their parent has permitted them to be educated and reared in a manner which he or she could not have afforded from his or her personal means, it was intended to abdicate the parental functions in favour and on behalf of the children, and when it is desired to resume parental control over them, which would result not only in bringing down their mode of life to a lower level, but also in depriving them of their legitimate expectations, such desire will be restrained.

It would appear from the case of *Lyons* v. *Blenkin* (*z*), which is the leading authority on this particular point, that the children need not be wards of Court to give the Court jurisdiction to interfere; and that in such a case a writ of *habeas corpus* is not the proper remedy for the parent, but a petition praying that the custody of the children should be restored to him or her.

Where the child is very young its own "wishes" will not be taken into consideration; but where it has arrived at a reasonable age, the practice of the judges was to see the child, not for the purpose of obtaining its consent, which it could not give, but for the purpose of determining what was really for the welfare of the child (*a*). "Custody" and "control" include the direction of the religious education of the infant (*b*).

Agreement to Surrender Control.—A third ground for interference by the Court is where the father has agreed with the mother or third persons to part with the control of his child. As has been seen (*c*), a father cannot legally bind himself under all circumstances to deprive himself of the custody and control of his child; and where he has not by his own bad conduct disentitled himself to enforce his rights, the Court would not enforce an agreement to abnegate his paternal rights.

A father may now, on separation, agree with the mother to give up the control of his children (*d*).

The father may also agree with third parties to surrender the control of his child; and if he has agreed to receive a benefit on condition of resigning the management of his child,

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(*y*) *Lyons* v. *Blenkin*, Jac. 245.
(*z*) Jac. 245.
(*a*) *Reg.* v. *Gyngall*, [1893] 2 Q. B. 232; 62 L. J. Q. B. 559.
(*b*) *Condon* v. *Vollum*, 57 L. T. 154.
(*c*) *Ante*, p. 513.
(*d*) 36 & 37 Vict. c. 12. See *post*, p. 508.

he will not be permitted to receive the benefit without complying with the terms of it (*e*). If a father has not so acted as to alter the expectations and fortunes of his child, he will be allowed to rescind and abandon any agreement for surrendering the custody of his child that he may have made (*f*). If a legacy has been left on condition that a father surrender the custody of his child to guardians appointed by the testator, he must, if he insist upon retaining the infant in his own care, renounce the legacy (*g*). But if a father intrust the care and custody of his infant children to another, who by will amply provides for their maintenance and education and appoints a guardian for them, and has allowed them to be brought up with expectations founded upon a particular species of maintenance and education, he will not be permitted to remove them from the control of the guardian, if a fit and proper person (*h*). The Court will not in general permit the father to disappoint the expectations of his children (*i*) in those cases where he has waived his parental right (*k*). From the foregoing cases it will be seen that the interference of the Court does not proceed upon the ground that the parent has made an election, and must abide by it, but upon the true interests of the children (*l*). These principles will also be acted upon in the case of the mother after the death of the father.

Removal of a Ward of Court out of the Jurisdiction.—A fourth ground for interference by the Court is where the infant is a ward of Court and the parent intends to remove him out of the jurisdiction (*m*). To remove a ward out of the jurisdiction is a gross contempt of Court, and the privilege of Parliament will not protect the contemnor from attachment (*n*). The Courts were formerly much more reluctant in granting leave to parents and guardians to take wards abroad and out of the jurisdiction than they are now (*o*), and were wont to impose terms and conditions on those who desired to remove them (*p*).

(*e*) *Colston* v. *Morris*, Jac. 257 *n*.
(*f*) See *Hill* v. *Gomme*, 8 L. J. Ch. 350.
(*g*) See *Potts* v. *Norton*, 2 P. Wms. 110 *n*.
(*h*) *Lyons* v. *Blenkin*, Jac. 245. This is a very important case on the subject, and in it Lord Eldon lays down very clearly the rules on which the Court of Chancery should proceed in interfering with parental control.
(*i*) *Anon.*, Jac. 254 *n*. (*k*) *Blake* v. *Leigh*, Amb. 306.
(*l*) *De Manneville* v. *De Manneville*, 10 Ves. 52; see also *Andrews* v. *Salt*, L. R. 8 Ch. App. 622.
(*m*) *Creuze* v. *Hunter*, Jac. 250 n; *Re Plomley*, *Vidler* v. *Collyer*, 47 L. T. 283.
(*n*) *Long Wellesley's Case*, 2 R. & M. 639.
(*o*) Macph. Inf. 129.
(*p*) *Johnson* v. *Hankey*, Jac. 265 *n*; *Stephens* v. *James*, 1 M. & K. 627.

But in more recent years wards have been allowed to go abroad in order to travel (*q*), to visit (*r*), on account of health (*s*), to attend sick parents (*t*). This liberty applies not only to male but female wards (*u*), whenever it can be exercised for their benefit (*x*). If the father be compelled to reside abroad, he will in general be permitted to have his children with him (*y*). A mother also who goes abroad for health will be allowed to take her infant child with her (*z*); and she has been allowed to take her children with her to India (*a*). The Court would, however, restrain the mother who was the guardian of a ward of Court from taking it out of the jurisdiction without leave. Leave is now given to take a ward out of the jurisdiction without a case of necessity being shown; but the Court must be satisfied that it is for the benefit of the infant, and that future orders will be obeyed. Security in this respect is generally obtained by appointing a guardian in this country to act jointly with the parent (*b*). This power of the Court to supersede the parent will be further discussed in Part IV. (*c*).

(b) Under its Statutory Jurisdiction.—The statutory jurisdiction has been conferred upon the Court for the purpose of enabling it to recognize in a fuller manner than formerly the rights of the mother, which under the old law were kept in the background, and acknowledged only when the outrageous conduct of the father and the imperative interests of the children demanded that she and not her husband ought to have their custody and control.

Infants' Custody Act, 1839.—To give the Court freer power to recognize the rights of the mother and the interests of her child the Infants' Custody Act, 1839 (*d*), known as Talfourd's Act, was passed after considerable opposition. It provided that the Lord Chancellor and the Master of the Rolls both in England and Ireland (*e*), upon hearing the petition of the mother of a

(*q*) *Talbot* v. *Earl of Shrewsbury*, 4 Myl. & Cr. 672.
(*r*) *Ex parte M'Key*, 1 Ba. & B. 405.
(*s*) *Wyndham* v. *Lord Ennismore*, 1 Ke. 467.
(*t*) *Biggs* v. *Terry*, 1 Myl. & Cr. 675.
(*u*) *Jeffreys* v. *Wanteswarstwarth*, Barn. Ch. 141; *Campbell* v. *Campbell*, cited Chamb. Inf. 30; *Clogstoun* v. *Walcot*, 9 Jur. 649.
(*x*) *Re Callaghan, Elliott* v. *Lambert*, 28 Ch. D. 186; 54 L. J. Ch. 292.
(*y*) *Re Thomas*, 22 L. J. Ch. 1075.
(*z*) *Lyon* v. *Watson*, cited Chamb. Inf. 32.
(*a*) *Re England*, 1 R. & M. 499.
(*b*) *Re Callaghan, Elliott* v. *Lambert* (*ubi sup.*).
(*c*) Infants, Wards of Court, *post*, chap. v.
(*d*) 2 & 3 Vict. c. 54. It is said that the passing of this Act was hastened by the decision of the King's Bench in *Rex* v. *Greenhill*, 4 A. & E. 624.
(*e*) Also the Vice-Chancellors. *Re Taylor*, 10 Sim. 291.

child who was in the custody or control of the father, or any other guardian, might make an order for the access of the mother to such child, subject to such regulations as might be deemed convenient and just; *and if the child were under the age of seven, might order that the mother might have the custody of it until it reached that age.* But no order for such access or custody was to be made if the mother was proved to have been guilty of adultery. The object of the Act was that the mother should have the protection of the law with respect to her children up to a certain age, and that she should be at liberty to assert her rights as a wife, without the risk of any injury being done to her feelings as a mother (*f*), to connect the paternal right with the marital duty, imposing the marital duty as the condition of recognizing the paternal right; and to protect the interests of the child (*g*). In order to carry out this object it gave the Court an absolute discretion in the case of children under the age of seven years, and a wide discretion in the case of those over that age, and if it were proved that the husband had grossly violated his marital duty, his paternal rights could be controlled, and his children placed in their mother's custody on her petition. If the mother is living apart from her husband without any justification, her petition will be unsuccessful (*h*), though it will be otherwise where she is justified in separating from him (*i*). Where the mother applies for the custody of her children, the Court will take great care that the father does not insist on his paternal rights as a means of compelling her to forgo her remedies against him for marital misconduct (*k*). The jurisdiction of the Court extends to children of English parents born abroad (*l*).

Infants' Custody Act, 1873.—In 1873 the Infants' Custody Act of that year (*m*) was passed, repealing the above-mentioned Act. Its first section provides:—

"From and after the passing of this Act, it shall be lawful for the High Court of Chancery in England or in Ireland respectively, upon hearing the petition by her next friend of the mother of any infant or

(*f*) *Warde* v. *Warde*, 2 Ph. 786. In this case Lord Cottenham said the object of passing Talfourd's Act was: (1) To obviate the improper and illegitimate use of the husband's rights and authority to put pressure upon the wife; (2) to give the Court a widened discretion on behalf of the innocent wife and the interests of the children.

(*g*) *Re Halliday's Estate*, 17 Jur. 56.

(*h*) *Re Taylor*, 10 Sim. 291.

(*i*) *Re Bartlett*, 2 Coll. 661.

(*k*) *Warde* v. *Warde*, 2 Ph. 786.

(*l*) *Hope* v. *Hope*, 26 L. J. Ch. 417.

(*m*) 36 & 37 Vict. c. 12.

infants under sixteen years of age, to order that the petitioner shall have access to such infant or infants at such times and subject to such regulations as the court shall deem proper, or to order that such infant or infants shall be delivered to the mother, and remain in or under her custody or control, or shall, if already in her custody or under her control, remain therein until such infant or infants shall attain such age, not exceeding sixteen, as the Court shall direct; and further to order that such custody or control shall be subject to such regulations as regards access by the father or guardian of such infant or infants, and otherwise, as the said court shall deem proper."

By this section the age to which the mother's rights are to extend is increased from seven to sixteen, and the mother may retain the care of those children already in her custody until they attain the age of sixteen.

Alteration Effected by the Infants' Custody Acts.—Under the Acts of 1839 and 1873 the wife acquired new rights, for these Acts gave the Court power on her petition alone to order that she should have the custody of her children, where their interests and benefit demanded it. The Courts had formerly refused to deprive the father of the custody of the child except in very extreme cases of misconduct, but in future, where the wife was innocent, the Court was to exercise a wider discretion, and consider other reasons besides (*n*); in other words, that which was the absolute right of the father was now subject to the discretionary power of the judge. Thus, where a husband, having abandoned his wife, and, being a co-respondent in a pending divorce action charging him with adultery, kidnapped the only child of the marriage, a boy three years of age, the Court, upon the wife's petition under the Infants' Custody Act, 1873, ordered immediate delivery of the child to her, with liberty of access by the father and paternal grandparents, and also liberty to apply as to the maintenance and education of the child on his attaining seven years of age (*o*). The paternal right, the marital duty, the conduct of the parents (*p*), and the interest of the child are taken into consideration in deciding whether the custody ought to be given to or retained by the mother (*q*). Where the child is above the age of sixteen, this Act does not give the Court jurisdiction (*r*).

(*n*) *Re Taylor (an Infant)*, 4 Ch. D. 157; 46 L. J. Ch. 399.
(*o*) *Re Taylor (an Infant)* (*ubi sup.*). See also *Re Goldsworthy*, 2 Q. B. D. 75; 46 L. J. Q. B. 187
(*p*) *Re Brown (Ethel)*, 13 Q. B. D. 614.
(*q*) *Re Elderton (Infants)*, 25 Ch. D. 220; 53 L. J. Ch. 258.
(*r*) *Re Agar-Ellis, Agar-Ellis* v. *Lascelles*, 24 Ch. D. 317; 53 L. J. Ch. 10.

The second section enacts:—

"No agreement contained in any separation deed made between the father and mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother: Provided always, that no court shall enforce any such agreement if the court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto."

It has been already seen (*s*) that an ante-nuptial agreement by a father to surrender the control and custody of his children never was and is not now binding on him. Formerly he was not allowed to forgo this right in a separation deed, and the Court would not enforce such a covenant in a separation deed even where the father had been guilty of adultery and cruelty (*t*). But the Courts in time did enforce such agreements, as, for instance, an agreement in a separation deed that the mother might have access to the children at reasonable times, the father retaining generally the custody and control of the children (*u*), and an agreement to give up the custody of the children to the mother, if the father's conduct had been such that the Courts would have deprived him of them, *e.g.*, gross immorality (*x*). Since the passing of the Act under discussion, no such agreement is *per se* invalid and not enforceable, or renders the deed of separation null and void, but, on the contrary, many deeds of arrangement entered into between husband and wife may now be upheld which formerly would have been treated as of no effect (*y*). But an arrangement of this kind does not amount in law to a substitution or delegation of his rights and powers by the husband to his wife, and he can, it seems, resume the exercise of them when he thinks proper. The touchstone of the validity of such an agreement is the benefit of the infant; and if the agreement is found not to be beneficial to the infant, the Court will set it aside, and restore the child to the custody of the father (*z*). Thus, where a father and mother executed a separation deed, in which the former covenanted that the latter should keep their child for eleven months in the year, and the

(*s*) *Ante*, p. 489.

(*t*) *Hope* v. *Hope*, 26 L. J. Ch. 417. Separation deeds were for a long while looked upon by the Courts of equity as contrary to public policy. See *ante*, Part I. chap. xv.

(*u*) *Hamilton* v. *Hector*, L. R. 13 Eq. 511, affirmed L. R. 6 Ch. 701; 40 L. J. Ch. 692.

(*x*) *Swift* v. *Swift*, 11 Jur. (N.S.) 148, 458.

(*y*) *Condon* v. *Vollum*, 57 L. T 154.

(*z*) *Re Besant*, 11 Ch. D. 508; 48 L. J. Ch. 497.

mother held and promulgated atheistical opinions, published an obscene book, and refused to allow the child to be religiously educated, the Court, on a petition under this Act, held that it would not be for the child's benefit to remain with her mother, and ordered her to be restored to the custody of her father (*a*).

Criminal Law Amendment Act, 1885.—Under the Criminal Law Amendment Act, 1885 (*b*), the Court before which the offence of seducing or prostituting a girl under sixteen years of age is proved may divest the father or mother of such girl of all authority over her, if it appear that such parent caused or encouraged or favoured such seduction or prostitution (*c*). The Court may appoint any person or persons willing to take charge of the girl till she reaches the age of twenty-one (*d*). The High Court may afterwards rescind or vary such order, by appointing any other person as guardian, or in any other respect (*e*).

Guardianship of Infants Act, 1886.—Under the Guardianship of Infants Act, 1886 (*f*), the Legislature conferred largely increased powers on the Court to deprive a father of the control and custody of his children, and at the same time greatly enlarged the rights and powers of the mother, both in her lifetime and after her death, in respect of the guardianship of her infant children. On the death of the father, who had not appointed a guardian, she succeeded to the sole guardianship of her infant offspring; and if the father had nominated a guardian, she became co-guardian with such nominee (*g*). But where no guardian had been appointed by the father, or if a guardian so appointed died or refused to act, and the mother resided out of the jurisdiction, the Court would seem to have had jurisdiction to appoint a guardian jointly with her (*h*); and the Court clearly had jurisdiction for good cause to remove her from her statutory guardianship, or to appoint a co-guardian or co-guardians to act with her (*i*).

The Court had jurisdiction to remove a guardian appointed by the mother after the father's death, under section 3, if such

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(*a*) *Re Besant*, 11 Ch. D. 508; 48 L. J. Ch. 497.
(*b*) 48 & 49 Vict. c. 69.
(*c*) See *Hiscocks* v. *Jermonson*, 10 Q. B. D. 360; 52 L. J. M. C. 42.
(*d*) Sect. 12.
(*e*) *Ibid.*
(*f*) 49 & 50 Vict. c. 27.
(*g*) Sect. 2.
(*h*) *Ibid.* For the practice under this section, see Rule 3 of the Rules under the Act.
(*i*) 49 & 50 Vict. c. 27, s. 2.

removal were called for in the interests of the children (*k*). A mother might also provisionally nominate a person to act as guardian of her infant children after her death jointly with the father (*l*). This provisional appointment in form was an appointment of a guardian to act jointly with the father (*m*). If after the mother's death the father were found to be unfitted to be the sole guardian of his children, this provisional appointment might be confirmed by the Court, who might displace the father altogether (*n*). The Court might, upon the application by petition of the mother of any infant (who might apply without next friend), make such order as it thought fit regarding the custody of the infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father (*o*), and might alter, vary, or discharge such order on the application of either parent, or after the death of either parent, of any guardian under the Act (*p*). The Court need not fix the limit of age at which the custody of the mother shall cease (*q*). Under this Act (*r*) the Court had ample jurisdiction to override the common law rights of a father where the mother was concerned in relation to the custody of his infant children (*s*).

Guardianship of Infants Act, 1925.—This Act claims to be a measure to establish equality in law between the sexes as to the guardianship of infants and the rights and responsibilities conferred thereby. It emphasizes that the principle upon which the Courts are to act in any question concerning the custody of the child is to make the first and paramount consideration the welfare of the infant, to disregard any common law right of the father, and not to regard either parent as having a superior right to the other.

The mother is to have the same right of applying to the Court as the father, and may apply while still residing with him,

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(*k*) *Re McGrath* (*Infants*), [1893] 1 Ch. 143; 62 L. J. Ch. 208.
(*l*) Sect. 3 (2).
(*m*) *Re G.* (*an Infant*), [1892] 1 Ch. 292; 61 L. J. Ch. 490.
(*n*) Sect. 3 (2). *Re G.* (*an Infant*) (*ubi sup.*). For the practice under this section see Rule 4 (*a*).
(*o*) Sect. 5. *Re Witten* (*an Infant*), 57 L. T. 336; *Re A. and B.* (*Infants*), [1897] 1 Ch. 786; 66 L. J. Ch. 592.
(*p*) Sect. 5. For the practice under this Act, see Rule 5. The County Court of the district in which any respondent resided had concurrent jurisdiction with the High Court. Sect. 9.
(*q*) *Re Witten* (*an Infant*) (*ubi sup.*).
(*r*) Sect. 5.
(*s*) *Re A. and B.* (*Infants*) (*ubi sup.*).

subject to an order for custody and maintenance of the child obtained by the mother ceasing to have effect if joint residence continues for three months after it is made. Section 2 of the Act of 1886 (*t*) is repealed and is replaced by section 4, sub-section 1 (*u*): on the death of the father of an infant, the mother, if surviving, shall, subject to the provisions of this Act, be guardian of the infant, either alone or jointly with any guardian appointed by the father. When no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is or are dead or refuses or refuse to act, the Court may, if it thinks fit, appoint a guardian to act jointly with the mother. Section 4, sub-section 2, is an exact replica with the exception that the words "mother" and "father" are interchanged. By section 5 the father and mother are separately and equally empowered to appoint testamentary guardians by deed or will. Any guardian so appointed shall act jointly with the surviving parent unless objection is made; and if the parent objects, or the guardian considers the surviving parent unfit to have the custody, the Court may either refuse to make any order (in which case the surviving parent remains sole guardian) or may order that the guardian shall act jointly or be the sole guardian, and may make such order as it thinks fit as to custody, access of the surviving parent, and for maintenance against the parent, as it considers reasonable. Section 3 of the Act of 1886 is repealed.

Custody of Children Act, 1891.—Under the Custody of Children Act, 1891 (*x*), where a parent (*y*), applying to the Court for the production of a child, is deemed by the Court to have abandoned or deserted the child, or has so misconducted himself that the Court ought to refuse to enforce his right to the custody, the Court may decline to issue the writ (*z*). If a child, whose production is applied for by writ, has been brought up by another person, or has been boarded out by poor-law guardians, the Court, if it orders the child to be given up to the parent, may order him to pay such person or guardian the whole or part of the costs incurred in bringing up the child (*a*). Where a parent has abandoned or deserted his child, or allowed it to be brought up at another person's or poor-law guardians' expense, for so long and under such circumstances as to satisfy

(*t*) 49 & 50 Vict. c. 27.
(*u*) 15 & 16 Geo. V. c. 45.
(*x*) 54 Vict. c. 3.
(*y*) See sect. 5.
(*z*) Sect. 1.
(*a*) Sect. 2.

the Court that he was unmindful of his parental duties, the child shall not be delivered up to him unless the Court is satisfied that, having regard to the welfare of the child, he is a fit person to have its custody (*b*). Though the Court may refuse to order the child to be delivered up to the parent, yet if it is being brought up in a religion different to that in which the parent has a legal right to require it to be brought up, the Court may, if it think fit, require it to be brought up in the parent's religion. But the Court may consult the wishes of the child; and any right which a child now has to exercise its own free choice is not to be diminished (*c*).

(2) By the Divorce Court.

The Divorce Court derives its jurisdiction over the control and custody of children from the statutes constituting it and enlarging its powers; but can only exercise it where a petition for dissolution of marriage or for judicial separation has been filed, and both parties are before the Court (*d*); and in suits for restitution of conjugal rights (*e*). It may exercise the power by making orders before or after decree as to custody of children, their maintenance and education (*f*), but has no further power where a petition has been dismissed (*g*).

Section 35 of the Matrimonial Causes Act, 1857 (*h*), is repealed, and replaced by section 193 (1) of the Supreme Court of Judicature Act, 1925, which enacts:—

"In any proceedings for divorce or nullity of marriage or judicial separation, the Court may from time to time either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of the proceedings, or if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the Court."

It has been held that the words in the earlier section, "just and proper," give to the Divorce Court a discretionary power exceeding that which had been previously exercised by Courts of

(*b*) Sect. 3.
(*c*) Sect. 4.
(*d*) *Stacey* v. *Stacey*, 29 L. J. P. M. & A. 63.
(*e*) 47 & 48 Vict. c. 68.
(*f*) Supreme Court of Judicature Act, 1925. c. 47, s. 193.
(*g*) *Seddon* v. *Seddon*, 31 L. J. P. M. & A. 101.
(*h*) This was the Act that constituted the Divorce Court which, with the Probate and Admiralty Courts, now forms the Probate, Divorce and Admiralty Division of the High Court.

law and equity (*i*). Though the Court will consider the interests of the parents (*k*), yet its chief aim is to do what is best for the interests of the children, and it will use every means for furthering that end (*l*), and will refuse the mother living in adultery access to a child (*m*). The Court has power to make orders as to the custody of children until they attain the age of sixteen years (*n*); but not as to those who have exceeded that age (*o*).

Custody Pending Suit.—In the interval between a decree *nisi* for dissolution of marriage being pronounced and its being made absolute, the only order the Court can make as to the custody of children is an interim order under this section (*p*). The Court has jurisdiction to make provision for the child of a marriage which is pronounced invalid in a suit for nullity (*q*). In making its order the Court will carefully look at all the actual circumstances, the age of the children, and their position in relation to the other members of their family (*r*). If it be to their interest, the elder children will be ordered to be kept at school, and the younger handed over to the care of their mother, with reasonable access allowed to the father (*s*).

Custody after Suit.—Section 4 of the Act of 1859 (*t*) conferred upon the Court the power to make orders after a final decree of judicial separation, nullity of marriage, or dissolution of marriage with respect to the custody, the maintenance, and education of the children of the parents whose matrimonial proceedings had been before it. The power is continued in the consolidating Act, the Supreme Court of Judicature Act, 1925, s. 193 (*u*). The same principles apply to orders made after final decree as to interim orders, namely, the consideration of the children's interests. The statutory powers of the Court in relation to the maintenance and education of children after a decree of judicial separation, or of dissolution of marriage, are not affected by any previous agreement between the parents (*x*).

(*i*) *Marsh* v. *Marsh*, 28 L. J. P. M. & A. 13.
(*k*) *Suggate* v. *Suggate*, 29 L. J. P. M. & A. 167.
(*l*) *Ryder* v. *Ryder*, 30 L. J. P. M. & A. 44; *Spratt* v. *Spratt*, 1 Sw. and Tr. 215; Macq. Div. 156-163. (*m*) *Clarke* v. *Clarke & Lindsay*. 57 Sol. J. 644.
(*n*) *Mallinson* v. *Mallinson*, L. R. 1 P. & D. 221; 35 L. J. P. M. & A. 84.
(*o*) *Ryder* v. *Ryder* (*ubi sup.*).
(*p*) *Cubley* v. *Cubley*, 30 L. J. P. M. & A. 161.
(*q*) *Langworthy* v. *Langworthy*, 11 P. D. 85; 55 L. J. P. D. 33.
(*r*) *Ryder* v. *Ryder* (*ubi sup.*).
(*s*) *Curtis* v. *Curtis*, 27 L. J. P. M. & A. 16. See the cases collected in Pritchard, Div. 72. (*t*) 22 & 23 Vict. c. 61. (*u*) 15 & 16 Geo. V. c. 49.
(*x*) *Bishop* v. *Bishop*, *Judkins* v. *Judkins*, [1897] P. 138; 66 L. J. P. 69; *Barry* v. *Barry*, [1901] P. 87; 70 L. J. P. 17.

As a general rule the innocent party has a *prima facie* right to the custody of the children (*y*); in the case of the mother, because a wife ought not to be deprived of the comfort and society of her children by her husband's wrong (*z*); but the Court will depart from the rule when it is for the interest of the children that their education should be free from her control (*a*). So, too, where the father is not likely to use his children harshly (*b*), the Court will not interfere more than is necessary in the exercise by the father of his parental judgment and discrimination in regard to his children (*c*). The Court can order either party to deliver up the children into the custody of the other (*d*); and, where neither party is fit to have their custody, to order either or both to hand over the children to other persons under its supervision (*e*). But this jurisdiction would seem to be limited to the lifetime of the parents (*f*). It is practically impossible to lay down any general rules on this subject (*g*). The Court can restrain a party to a suit for judicial separation or dissolution of marriage from removing a child of the marriage out of the jurisdiction (*h*). The Court can enforce obedience to its orders by attachment (*i*).

The Court has like power over the custody of children under the provisions of the Supreme Court of Judicature Act, 1925 (*k*); and at any time before final decree on any application for restitution of conjugal rights or after final decree, if the respondent has failed to comply therewith, to make orders with respect to the custody, education and maintenance of the children of the parties (*l*).

Access.—The Court has power to order access to the children by the parents not possessing their custody not only after final

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(*y*) *Martin* v. *Martin*, 29 L. J. P. M. & A. 106.
(*z*) *Suggate* v. *Suggate*, 29 L. J. P. M. & A. 167; *Boynton* v. *Boynton*, 30 L. J. P. M. & A. 156.
(*a*) See *D'Alton* v. *D'Alton*, 4 P. D. 87; 47 L. J. P. D. & A. 59.
(*b*) *Martin* v. *Martin* (*ubi sup.*).
(*c*) See *Maudslay* v. *Maudslay*, 2 P. D. 256; 47 L. J. P. D. & A. 26.
(*d*) *Hyde* v. *Hyde*, 29 L. J. P. M. & A. 150; *March* v. *March and Palumbo*, L. R. 1 P. & D. 437 (father), 36 L. J. P. M. & A. 65; *Boyd* v. *Boyd*, 29 L. J. P. M. & A. 79 (mother).
(*e*) *Chetwynd* v. *Chetwynd*, L. R. 1 P. & D. 39; 34 L. J. P. M. & A. 130; and see *March* v. *March and Palumbo* (*ubi sup.*).
(*f*) See *Davis* v. *Davis*, 14 P. D. 162; 58 L. J. P. 88.
(*g*) Per Cairns, L.C., in *Symington* v. *Symington*, L. R. 2 H. L. Sc. App. 415, 420.
(*h*) *Harris* v. *Harris*, 63 L. T. 262.
(*i*) *Brown* v. *Brown*, 62 J. P. 568.
(*k*) 15 Geo. V. c. 49, s. 193.
(*l*) *Ibid.*

decree (*m*), but *pendente lite* (*n*); and in this case the Court is mainly influenced by considerations for the health of the child (*o*). Access, like custody, is in the discretion of the Court; the welfare of the child is the paramount consideration, not the punishment of the guilty party (*p*), and though the Court rarely exercises it it has power to grant to the guilty party access to the children after final decree (*q*), but if it refuses to do so, the Court of Chancery, whether it possesses such discretionary power or not under the Guardianship of Infants Act, 1886, will not exercise it (*r*).

Guardianship of Infants Act, 1886.—Under the Guardianship of Infants Act, 1886 (*s*), in any case where a decree for a judicial separation or a decree, either *nisi* or absolute, for divorce shall be pronounced, the Court pronouncing such decree may thereby declare the parent, by reason of whose misconduct such decree is made, to be a person unfit to have the custody of the children of the marriage; and in such case, the parent so declared to be unfit shall not, upon the death of the other parent, be entitled as of right to the custody or guardianship of such children (*t*); but the conduct of the parent must have been of an aggravated nature (*u*). The Court will postpone making the decree to enable the petitioner to prove the unfitness of the respondent (*x*). Gross acts of cruelty towards the mother and the child are grounds for declaring that the husband and father is unfit to have the custody of the child (*y*). If the order is made, the parent against whom it is made has, on the death of the petitioner, the onus of proof that he or she has since become a person who is fit to be entrusted with the care of the children (*z*).

Power to Vary Order.—The Court has power to vary the order for the custody of children after decree absolute, and remove them from the custody of the originally innocent party, if subsequently found to be unfit to have their custody, and may

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(*m*) *Handley* v. *Handley*, [1891] P. 124.
(*n*) *Thompson* v. *Thompson*, 31 L. J. P. M. & A. 213.
(*o*) *Philip* v. *Philip*, 41 L. J. P. M. & A. 89. For what is reasonable access, and how it is to be carried out, see Prit. Div. Pr. 75-77.
(*p*) *B.* v. *B.*, [1924] P. 176; 93 L. J. P. 84.
(*q*) *Handley* v. *Handley* (*ubi sup.*); *Clarke* v. *Clarke and Lindsay*, 57 Sol. J. 644; *B.* v. *B.* & *T.*, 126 L. T. 109.
(*r*) *Manders* v. *Manders*, 63 L. T. 627.
(*s*) 49 & 50 Vict. c. 27.
(*t*) Sect. 7. *Skinner* v. *Skinner*, 13 P. D. 90; 57 L. J. P. 104.
(*u*) See *Woolnoth* v. *Woolnoth*, 86 L. T. 598.
(*x*) *Robinson* v. *Robinson*, 57 L. T. 118.
(*y*) *Handford* v. *Handford*, 63 L. T. 256.
(*z*) *Webley* v. *Webley*, 64 L. T. 839; *Hitchings* v. *Hitchings*, 67 L. T. 530.

make an order for their transference to the custody of the original respondent, if deemed to be a fit and proper person to have the control (*a*). But under section 4 of the Matrimonial Causes Act, 1859 (*b*), upon the death of a parent of a child who was entitled to its custody under a decree for judicial separation, the Court has no jurisdiction to entertain an application for its custody by a stranger (*c*).

This Court, though possessing jurisdiction in the matter of maintenance and education of children of parties before it, has not the same jurisdiction as the Court of Chancery over wards of Court (*d*) so as to be able to compel persons to attend and be examined as to the whereabouts of the children (*e*).

Intervention of Third Parties.—Parties who are strangers to the suit will be allowed to intervene in the interests of children, and plead upon the question of their custody, maintenance, or education (*f*); but such intervention will be at the peril of the interveners in the matter of costs (*g*).

(3) By Other Courts.

Under the Summary Jurisdiction (Married Women) Act, 1895 (*h*), a married woman may obtain from the Court of Summary Jurisdiction an order providing that the legal custody of any children of the marriage while under sixteen years of age may be committed to her (*i*). Under the provisions of the Amending Act (*j*), such order may be served upon any person in whose actual custody the children may for the time being be, and may without prejudice to any other remedy, be enforced under the Summary Jurisdiction Act, 1879, s. 34, sub-s. 2, as if it were an order requiring that person to give up the custody to the applicant. Subsequent voluntary resumption of cohabitation or adultery on her part shall cause the order of the Court to cease to

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(*a*) *Witt* v. *Witt*, [1891] P. 163; 60 L. J. P. 63; see *Symington* v. *Symington*, L. R. 2 H. L. Sc. App. 415.

(*b*) 22 & 23 Vict. c. 61.

(*c*) *Davis* v. *Davis*, 14 P. D. 162; 58 L. J. P. 88.

(*d*) See *Rosenberg* v. *Lindo*, 48 L. T. 478; and *post*, Part IV. ch. v.

(*e*) *Hyde* v. *Hyde*, 13 P. D. 166; 57 L. J. P. 89.

(*f*) *Chetwynd* v. *Chetwynd*, L. R. 1 P. & D. 39; 34 L. J. P. M. & A. 130; *Godrich* v. *Godrich*, L. R. 3 P. & D. 134; 43 L. J. P. & M. 2.

(*g*) *March* v. *March and Palumbo*, L. R. 1 P. & D. 437; 36 L. J. P. M. & A. 65.

(*h*) 58 & 59 Vict. c. 39, repealing 41 Vict. c. 19, s. 4 (Matrimonial Causes Act, 1878).

(*i*) Sect. 5 (*b*).

(*j*) 15 & 16 Geo. V. c. 51, s. 5.

have effect (*k*) so also if not having left her husband when she obtained the order she continues to reside with him for a period of three months (*l*). The Court has power to order the restoration of the children to the custody of the father on the divorce of the mother for adultery; though the father had agreed by the terms of a separation deed to permit the mother to have the custody of them (*m*).

An alteration of some importance has been recently effected in the law dealing with responsibilities and liabilities of parents towards their young children; and they are now liable to be made personally responsible for wrongs committed by children led up to or caused by their own neglect of duty. Thus, where a parent or guardian is shown to have conduced to the commission of an offence by his child, by neglect to exercise due care of him, such parent may be ordered to pay any fine, damages, or costs imposed upon the child, and to find security for its good behaviour (*n*). An order may be made where the parent or guardian having been given an opportunity to attend has failed to do so, but he must be given an opportunity of being heard, and he has a right of appeal from a Court of Summary Jurisdiction to a Court of Quarter Sessions, or if the order is made by a Court of Quarter Sessions to the Court of Criminal Appeal (*o*).

Poor Law Act, 1889.—Under the Poor Law Act, 1889 (*p*), where a child deserted by its parent (*q*) is maintained by the guardians of any union, the latter may by resolution vest in themselves the control of a boy up to sixteen, and of a girl up to eighteen years of age, as though they were the parents of the infant (*r*). The parent is not thereby relieved from liability to contribute to the maintenance of his child (*s*). Such control may be terminated by the order of a Court of Summary Jurisdiction on the complaint of the parent that the child has neither been maintained by the guardians nor deserted by him (*t*). This right of control of the person of the child does not empower the guardians to educate the child in any other religious faith than that in which it would have been educated but for the resolution to vest its control in themselves (*u*).

Habitual Drunkards.—Under the Licensing Act, 1902 (*x*),

(*k*) 15 & 16 Geo. V. c. 51, s. 2 (2).
(*l*) *Ibid.* s. 1 (4).
(*m*) *Jump* v. *Jump*, 8 P. D. 159; 52 L. J. P. D. 71.
(*n*) 8 Edw. VII. c. 67, s. 99.
(*o*) Sect. 99 (4) (6).
(*p*) 52 & 53 Vict. c. 56.
(*q*) See sect. 4.
(*r*) Sect. 1.
(*s*) Sect. 1 (5).
(*t*) Sect. 1 (2).
(*u*) Sect. 1 (6).
(*x*) 2 Edw. VII. c. 28

where the husband of a married woman is an habitual drunkard (which expression includes an habitual drug taker except upon medical advice (*y*)), the married woman shall be entitled to apply for an order under the Summary Jurisdiction (Married Women) Act, 1895; and that Act, which gives a Court of Summary Jurisdiction power to make an order providing, *inter alia*, for the legal custody of any children of the marriage, (*z*) shall apply, and where the wife of a married man is an habitual drunkard, the man shall be entitled under this Act to make an application for relief, to which application the Summary Jurisdiction (Married Women) Act, 1895, shall apply, thereby enabling a Court of Summary Jurisdiction to make an order providing, *inter alia*, for the legal custody of any children of the marriage (*a*).

The jurisdiction of the High Court and Courts of Quarter Sessions and Petty Sessions to interfere with the guardianship and control of parents convicted of an offence against their children under the Prevention of Cruelty to Children Act, 1904 (*b*), and the jurisdiction under the Children Act, 1908 (*c*), will be found more fully set out in Part IV. chap. vi., which deals with the Remedies for the Protection of Infants.

SECTION 3.

Obligations of Parents.

Protection.—The first obligation or duty laid upon parents is to protect and shield their offspring. This duty is suggested by the dictates and necessities of Nature itself. This duty the stronger owes to the weaker, and especially does the father owe it to his child, so long as the latter remains comparatively helpless. This obligation may be shifted in time, as age adds to the strength of the one and the infirmities of the other (*d*). Blackstone speaks of this duty as being a natural one, "but rather permitted than enjoined by our municipal law; Nature, in this respect, working so strongly as to need rather a check than a spur. It is, however, distinctly recognized in the English jurisprudence; it being laid down, in particular, that a

(*y*) Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 3.
(*z*) Sect. 5.
(*a*) *Ibid.*
(*b*) 4 Edw. VII. c. 15.
(*c*) 8 Edw. VII. c. 67.
(*d*) Sch. Dom. Rel. s. 234.

parent may maintain and uphold his children in their lawsuits, without being guilty of the offence of maintaining quarrels; and that he may also justify an assault and battery in defence of their persons" (*e*).

Maintenance (*f*).—The next duty of parents is to maintain and support their children till the latter reach an age at which they can by their own work and industry support themselves. It is a natural obligation, and "except under the operation of the Poor Law, there is no legal obligation on the part of the father to maintain his child, unless indeed the neglect to do so should bring the case within the criminal law. Civilly there is no such obligation" (*g*). The first statutory enactment that cast this burden of support upon parents was the Poor Law Act of 43 Eliz. c. 2, which by its sixth section provided that "the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of sufficient ability, shall at their own charges relieve and maintain such poor person in that manner, and according to that rate, *as by the justices of peace of that county where such sufficient persons dwell, or the greater number of them, at their general quarter sessions, shall be assessed, upon pain that every one of them shall forfeit twenty shillings for every month which they shall fail therein.*" The words in italics are repealed by 31 & 32 Vict. c. 122 (*h*); and now justices in petty sessions have the power of making orders of maintenance under the provisions of 11 & 12 Vict. c. 43. It is not unimportant to notice the words "of sufficient ability," for unless the parent is able to maintain his child, he is not within the penal provisions of the Poor Law Statutes (*i*); nor is he liable at common law for neglecting to furnish proper food and clothing (*k*).

The statute of Elizabeth extended only to natural relations and not relations in law; therefore a husband was not bound to maintain his wife's children by a former marriage (*l*). But an

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(*e*) 1 Hawk. P. C. 131; 1 Bl. Com. 450.

(*f*) The word "maintenance" in this sense has much the same meaning as the civil law term "aliment."

(*g*) Per Cockburn, C.J., in *Bazeley* v. *Forder*, L. R. 3 Q. B. 559; 37 L. J. Q. B. 237.

(*h*) Poor Law Amendment Act, 1868.

(*i*) *St. Andrew's Undershaft* v. *de Breta*, 1 Ld. Raym. 699.

(*k*) See *Reg.* v. *Rugg*, 24 L. T. 192.

(*l*) *Rex* v. *Munday*, 1 Stra. 190; *Tubb* v. *Harrison*, 4 T. R. 118; *Cooper* v. *Martin*, 4 East, 76; and see *Rex* v. *Kempson*, 2 Stra. 955; Bott, Sess. Cas. 230.

alteration has been effected by the Poor Law Amendment Act, 1834 (*m*), which enacts

"that every man who, from and after the passing of this Act, shall marry a woman having a child or children at the time of such marriage, whether such child or children be legitimate or illegitimate, shall be liable to maintain such child or children as a part of his family, and shall be chargeable with all relief, or the cost price thereof, granted to or on account of such child or children, until such child or children shall respectively attain the age of sixteen, or until the death of the mother of such child or children, and such child or children shall, for the purposes of this Act, be deemed a part of such husband's family accordingly" (*n*).

Liability of Grandparents.—While grandparents may be called upon to maintain a pauper grandchild not able to work (*o*), there is no corresponding liability upon a grandchild to maintain its grandparent (*p*).

Parents Neglecting their Children.—There is now a statutory duty on parents to provide adequate food, clothing, medical aid, or lodging for their children in their custody under the age of fourteen years for boys, and sixteen for girls. The wilful neglect of this duty, which is likely to cause children unnecessary suffering, is a misdemeanour punishable either on indictment or on summary conviction (*q*). It is an indictable offence for any parent to refuse or neglect to provide sufficient food or other necessaries for any infant of tender years, unable to provide for and take care of itself, so as thereby to injure its health (*r*). Parents may be convicted of ill-treatment of a lunatic child over age, as persons having the care of it (*s*).

Liability of Soldiers.—There is a difference between the liability of a civilian and that of a soldier in respect of the maintenance of his child, whether legitimate or bastard; for though a soldier is liable for its maintenance as though he were a civilian, yet execution in respect of any order or decree for such maintenance is not to issue against his person, pay, arms, ammunition, equipments, instruments, regimental necessaries, or clothing; nor is he liable to be punished for deserting his family or leaving it chargeable (*t*). When an order or

(*m*) 4 & 5 Wm. IV. c. 76.

(*n*) Sect. 57. See *Hill* v. *Hill*, [1902] P. 140; 71 L. J. P. 81, a decision under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 4.

(*o*) *Bevan* v. *M'Mahon*, 28 L. J. P. M. & A. 127.

(*p*) *Maund* v. *Mason*, L. R. 9 Q. B. 254; 43 L. J. M. C. 62.

(*q*) 4 Edw. VII. c. 15, s. 1. See *post*, Part III. chap. v.

(*r*) *Rex* v. *Friend et uxor*, cited 1 Russ. Cr. 949.

(*s*) *Buchanan* v. *Hardy*, 18 Q. B. D. 486; 56 L. J. Q. B. 42. This was a conviction under 16 & 17 Vict. c. 96, s. 9.

(*t*) 44 & 45 Vict. c. 58, s. 145 (1).

decree for maintenance has been made on a soldier, it is to be sent to a Secretary of State, who may order a certain portion of his pay, according to his rank, to be deducted and appropriated towards the maintenance of his family (*u*).

Liability of the Mother.—At common law there was even less liability on the part of the mother or grandmother to support and maintain their children or grandchildren; and it was only the statute of Elizabeth (*x*) that imposed the burden of supporting their children till they had attained the age of sixteen years upon the mothers as well as upon the fathers. This provision did not affect the primary liability of the father and grandfather; but recently there has been an important modification. This liability was never enforced against a *feme covert*, whether mother or grandmother (*y*). But by the Married Women's Property Act, 1870 (*z*), a new liability was imposed upon a married woman with separate estate; for after the passing of that Act a married woman with separate estate was liable for the maintenance of her children as a widow was then by law subject to the maintenance of her children. This section was held not to include grandmothers possessing separate property, but was limited to mothers only (*a*). But by the Married Women's Property Act, 1882 (*b*), it is provided that "a married woman having separate property shall be subject to all such liability for the maintenance of her children and *grandchildren* as the husband is now by law subject to for the maintenance of her children and grandchildren." The mother may be indicted for refusing or neglecting to provide sufficient food or other necessaries for her infant child, unable to provide for and take care of itself, whereby its health is injured (*c*).

Liability Under Children Act, 1908.—An order may be made under this Act against a person having the custody and control of a child where that person is deprived of such custody and control, ordering a sum to be paid to the substituted guardian by way of maintenance for the benefit of the child (*d*), to an amount

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(*u*) 44 & 45 Vict. c. 58, s. 145 (2).
(*x*) 43 Eliz. c. 2, s. 6.
(*y*) *Custodes* v. *Jinks*, Sty. 283.
(*z*) 33 & 34 Vict. c. 93, s. 14.
(*a*) *Coleman* v. *The Overseers of Birmingham*, 6 Q. B. D. 615; 50 L. J. M. C. 92.
(*b*) 45 & 46 Vict. c. 75, s. 21. Whether this section will be held to render a married woman liable for the support and maintenance of her *step-grandchildren* remains to be decided; the words seem almost wide enough to render her so liable.
(*c*) See *Reg.* v. *Phillpot*, Dears C. C. R. 179.

not exceeding £1 a week (*e*). Where a youthful offender is ordered to be sent to or detained in an industrial school, the parent or other person liable to maintain the child shall, if able to do so, contribute to his maintenance a sum representing the average cost of maintenance in such school (*f*). The person liable to maintain a youthful offender includes his step-father, a person cohabiting with the mother, whether or not he is the father, and the putative father of an illegitimate child (*g*).

Age at which Liability of Parents Ceases.—The statutory liability of the parents to support their children ceases when the latter attain sixteen, unless they are blind, or deaf and dumb, or impotent, or otherwise unable to work for themselves (*h*). If the parent retains the custody of the child, the liability to support and maintain it will extend to majority (*i*), and the Court of Divorce has jurisdiction to make orders respecting the custody of children till they attain their majority (*k*). The statutory liability to support their *step*-children ceases when they attain the age of sixteen years, irrespectively of their becoming chargeable or not (*l*).

Liability of Parents for Necessaries.—This liability is *prima facie* on the father, though by recent legislation a mother during coverture, who is possessed of separate property, may have this burden cast upon her. As has been seen, there was no legal obligation apart from the Poor Laws on the parent to support his children, or to pay their debts unless he contracted to do so (*m*). The law on the subject has been thus laid down. "In point of law, a father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son than a brother, or an uncle, or a mere stranger would be. From the moral obligation a parent is under to provide for his children, a jury are, not unnaturally, disposed to infer against him an admission of a liability in respect of claims upon his son, on grounds which warrant no such inference in point of law, and . . . if a father does any specific act, from which it may reasonably be inferred that he has authorized his son to contract a debt, he may be liable in respect of the debt so contracted; but the

(*e*) 8 Edw. VII. c. 67, s. 22 (2).
(*f*) Sect. 75.
(*g*) Sect. 125.
(*h*) 43 Eliz. c. 2, s. 6; 4 & 5 Wm. IV. c. 76, s. 56.
(*i*) *Thomasset* v. *Thomasset*, [1894] P. 295; 63 L. J. P. 140.
(*k*) *Ibid.* And see Supreme Court of Judicature (Consolidation) Act, 1925, s. 193.
(*l*) 4 & 5 Wm. IV. c. 76, s. 57; 45 & 46 Vict. c. 75, s. 21.
(*m*) *Cooper* v. *Martin*, 4 East, 76.

mere moral obligation on the father to maintain his child affords no inference of a legal promise to pay his debts" (*n*); and this is so even where the debts contracted are for necessaries supplied to the son, whose only resource in the absence of anything to show a contract on the father's part is to apply to the parish, and then the proper steps will be taken to enforce the performance of the parent's legal duty (*o*). If goods, then, are supplied to an infant child without the knowledge of the father, the father is not bound to pay for them, for he cannot be made liable for them except by way of contract (*p*). Since the case of *Mortimore* v. *Wright* (*q*), it cannot be held to be law that the mere knowledge on the part of the father that his child was being maintained and supported by a stranger would fix him with the liability to pay for the necessaries supplied by the stranger. The law, it seems, would only imply a liability to repay another for the support of his child, where he has deserted it, and it was in a destitute state (*r*). A parent's authority to a stranger to supply goods to a child may be inferred from letters (*s*).

The above point has not yet been fully decided. It was pointed out by Salter, J., in *Coldingham Parish Council* v. *Smith* (*t*) that in *Urmston* v. *Newcomen* (*u*) it was suggested but not decided that a promise to pay for necessaries would be implied by law where a father has deserted a legitimate child unable to maintain himself. The decision of Salter, J., was that whatever liability there might be during infancy the father was not liable, in the absence of an order of justices under 43 Eliz., for the maintenance of an adult son. It would be hazardous to venture on a confident opinion as to what the decision will be when the point arises; but the fact that the parents are by statute responsible for the maintenance of the child to the parish in which it is left deserted, is not without some force in favour of the contention that they ought, even in the absence of express contract, to be held liable to the stranger voluntarily providing that which they are by statute bound to provide. It is further submitted that no difference would be made between

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(*n*) Per Lord Abinger, C.B., in *Mortimore* v. *Wright*, 6 M. & W. 482.
(*o*) *Shelton* v. *Springett*, 11 C. B. 452.
(*p*) *Fluck* v. *Tollemache*, 1 C. & P. 5; *Urmston* v. *Newcomen*, 4 A. & E. 899.
(*q*) 6 M. & W. 482, overruling the cases of *Nichole* v. *Allen*, 3 C. & P. 96, and *Law* v. *Wilkin*, 6 A. & E. 718.
(*r*) *Urmston* v. *Newcomen* (*ubi sup.*).
(*s*) *Andrews* v. *Garratt*, 6 C. B. (N.S.) 262.
(*t*) [1918] 2 K. B. 90. (*u*) *Ubi sup.*

things which were necessaries and things which were not necessaries. The child having an allowance would negative the theory of the implied contract on the part of the parents (*x*).

Liability of Father when Mother Lives Apart.—But where the child dwells with the mother, who is living apart from the father, a different class of questions arises depending upon the fact whether or not she is living apart voluntarily, or because of the misconduct of the husband. It is a question for the jury whether a husband, living apart from his wife, and allowing the children to remain with her, does not constitute her his agent, and authorize her to contract debts for clothing and necessaries for them (*y*). Where the mother, of her own free will, separates herself from the father and against his will, and takes the child with her, she will be liable for necessaries supplied to the child, and not the father; and since the passing of the Married Women's Property Acts, 1882 and 1893, her liability has become more marked; for she now *prima facie* contracts, unless she proves agency, so as to render herself liable (*z*); and she would find it difficult, except by implication, to set up successfully that she contracted as the agent of her husband so as to bind him. So, too, when divorced, whether for her own or her husband's misconduct, a wife loses this capacity of an agent.

Where the wife voluntarily separates herself from her husband on account of his misconduct, and carries their child with her by virtue of an order of Court (*a*) giving her the custody, she has the power to pledge her husband's credit for necessaries supplied to the child (*b*). This is a strong case, and one that extends the liability of the father in the face of the ordinary presumption that the award of the child to the mother would carry with it a transfer of parental duties as well as of parental rights. But where the mother takes the child without an order of Court giving her the custody, the question whether she had or had not authority to pledge the

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(*x*) *Crantz* v. *Gell*, 2 Esp. 471.

(*y*) Per Lord Eldon, in *Rawlyns* v. *Vandyke*, 3 Esp. 252.

(*z*) 56 & 57 Vict. c. 63, s. 1. An important fact in rebutting this *prima facie* liability would be the restraint upon anticipation affecting the whole of her property. See *ante*, Part I. chap. xiii.

(*a*) Under 36 & 37 Vict. c. 12.

(*b*) *Bazeley* v. *Forder*, L. R. 3 Q. B. 559: 37 L. J. Q. B. 237. In this case, Cockburn, C.J., differed from Blackburn, Mellor, and Lush, J.J.; and his ruling was approved by the majority of the Irish Exchequer Chamber in *Mecredy* v. *Taylor*, I. R. 7 C. L. 256.

father's credit would be for the jury; and if she has separate estate, the presumption that she contracts in respect of and to bind that estate would, it is submitted, under such circumstances, render it very difficult for her to prove that she was acting as agent for her husband. If a father allowed his children to live with and be brought up by one of his servants, he no doubt would be held liable on contracts entered into by such servant as his agent (*c*).

Maintenance Ordered by Divorce Court.—The Divorce Court has the power to order the father to contribute to the maintenance of his children on his divorce or separation (*d*), and to apply a part of the mother's income under a settlement for that purpose when she is in fault (*e*). The Court has also control over the marriage settlements (ante-nuptial or post-nuptial) of the parties whose marriages are annulled or dissolved, and may apply the whole or a portion of the property so settled for the benefit of the children of the marriage (*f*). The object of the variation of the provisions of the settlement should be to prevent so far as may be just and practicable the innocent party from being pecuniarily damaged by the dissolution of the marriage (*g*). The Court has power to limit (*h*), or take away altogether (*i*), the right to exercise a power of appointment over the settled fund which might have existed in the guilty party (*k*).

Owing to the liability of parents under the poor laws to support the offspring of their children, the parents have sufficient interest to bring a suit for annulling the marriage of a child which is alleged to be void, as they may become liable for the support of the issue of such marriage (*l*).

Maintenance in Equity.—Equity recognized the moral liability of a father to support and maintain his children, if of ability to do so, and to provide for them according to their expectations (*m*), and an allowance was ordered out of a lunatic father's estate for the maintenance of his children, though they

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(*c*) *Cooper* v. *Phillips*, 4 C. & P. 581.
(*d*) 22 & 23 Vict. c. 61, ss. 4, 5; *Milford* v. *Milford*, L. R. 1 P. & D. 715.
(*e*) *Seatle* v. *Seatle*, 30 L. J. P. M. & A. 216.
(*f*) 22 & 23 Vict. c. 61, s. 5.
(*g*) *Maudslay* v. *Maudslay*, 2 P. D. 256; 47 L. J. P. D. & A. 26.
(*h*) *Noel* v. *Noel*, 10 P. D. 179; 54 L. J. Ch. 73.
(*i*) *Bosvile* v. *Bosvile and Craven*, 13 P. D. 76; 57 L. J. P. 62.
(*k*) See *ante*, Part I. chap. vi.
(*l*) *Ray* v. *Sherwood*, 1 Moo. P. C. 396; *Bevan* v. *McMahon* (f. c. *McMahon*) 28 L. J. P. & M. 127; *Wells* v. *Cottam* (f. c. *Wells*) 33 L. J. P. & M. 41; 45 & 46 Vict. c. 75, s. 21.
(*m*) See *Wellesley* v. *Duke of Beaufort*, 2 Russ. 1.

were illegitimate (*n*). As a consequence of this recognition of the paternal duty, maintenance will not generally be allowed to a father for the support of his children (*o*). Under the Trustee Act, 1925 (*p*), trustees who hold property in trust for infant children, whether for life or a larger interest, may at their sole discretion pay to the parent or guardian the whole or such part of the income, if any, of that property for their maintenance, education, or benefit.

Education.—The next and now one of the most important duties cast upon parents is the education of their children. Modern views with respect to it differ much from those prevailing in former times. For facility of treatment, the subject will be divided into (a) Secular; (b) Religious. Under this latter head will be discussed the rights of the father to have his children educated in his own faith, and how such rights may be modified.

(a) Secular.—In former times, and until recently, a parent was not legally compelled to educate his child; the duty of education fell within the category of moral and not legal obligations. In 1870 facilities for affording elementary education were provided by the Elementary Education Act, 1870 (*q*); and school boards set up under its provisions could make by-laws enforcing the attendance of children at school, and punishing for the breach of such by-laws. But not until the passing of the Elementary Education Act, 1876 (*r*), was there any express statutory declaration as to the duty of a parent to cause his child to receive efficient elementary education.

The Education Act, 1921 (*s*), consolidates the previous enactments relating to education, and in Part IV. sets out the duty of a parent (*t*). By section 42 it enacts that "it shall be the duty of the parent of every child between the ages of five and fourteen, or, if a byelaw under this Act so provides, between the ages of six and fourteen, to cause that child to receive efficient elemen-

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(*n*) *Ex parte Haycock*, 5 Russ. 154.
(*o*) See *post*, Part III. chap. v.
(*p*) 15 Geo. V. c. 19, s. 31.
(*q*) 33 & 34 Vict. c. 75.
(*r*) 39 & 40 Vict. c. 79.
(*s*) 11 & 12 Geo. V. c. 51.
(*t*) "Parent" includes guardian, and every person who is liable to maintain, or has the actual custody of any child (s. 170 (12)), *i.e.*, father and grandfather, mother and grandmother of a child, who by 43 Eliz. c. 2, s. 7, are liable to maintain it. A married woman having property of her own would clearly be liable under this section; so, too, where the father is away, and the mother is left in charge of the child. *Hance* v. *Burnett*, 45 J. P. 54; see also *London School Board* v. *Jackson*, 7 Q. B. D. 502; 51 L. J. M. C. 134.

tary instruction in reading, writing, and arithmetic." Provisions are contained as to the establishment of continuation schools and the attendance thereat of young persons to the ages of sixteen and eighteen in sections 75—79. Where the parent of any such child habitually and without reasonable excuse (*u*), neglects to provide efficient elementary instruction for his child, or if any such child is found habitually wandering or not under proper control, or in the company of rogues, vagabonds, disorderly persons, or reputed criminals, it is the duty of the local education authority, after due warning to the parent, to complain to a Court of Summary Jurisdiction with a view to obtaining a school attendance order (*x*). Reasonable excuses include the following (a) that the child has been prevented from attending school by sickness or any unavoidable cause; (b) that there is no public elementary school open which the child can attend within such distance not exceeding three miles according to the nearest road as the by-laws may prescribe; (c) in the case of non-compliance with a by-law requiring a parent to cause his child to attend school, that the child is under efficient instruction in some other manner. Distance is not a reasonable excuse where the local education authority provide suitable means of conveyance. The excuses set out do not exhaust what are possible excuses (*u*) and what amounts to a reasonable excuse will depend on the circumstances of each case (*y*).

A parent is liable to a penalty if the child is not sent to school, though it may be in the actual custody and control of some third person (*z*). No fees are to be charged or other charges of any kind made in any public elementary school (*a*).

As long as the father causes his child to receive what may be called a statutory elementary education, his duties towards his child from a legal point of view are complete. A rich man is not more bound (and indeed is not bound at all) to send his son to an expensive public school, or employ a governess for his daughter, than a poor man is bound to afford elementary education to his offspring. Education by the parent according to station in life is a moral and not a legal obligation. Thus, as Lord Kenyon has it, "a father was bound by every social tie to give his children an education suitable to their rank, but it was a duty

(*u*) *Belper School Board* v. *Bailey*, 9 Q. B. D. 259; 51 L. J. M. C. 911.
(*x*) Sect. 43.
(*y*) *London School Board* v. *Duggan*, 13 Q. B. D. 176; 53 L. J. Q. B. 104.
(*z*) *London School Board* v. *Jackson*, 7 Q. B. D. 502; 51 L. J. M. C. 134.
(*a*) Education Act, 1921, s. 37 (1).

of imperfect obligation, and could not be enforced by a Court of law. The richest man in the kingdom might say to his heir-apparent, 'Go and earn your daily bread by your daily labour,' and the law could not interfere. There is no further obligation than that which Nature has implanted in his breast. The law obliged him to nothing but nurture" (*b*).

This moderate obligation on the part of the father is considerably increased when the child is under the custody of guardians, who are bound to educate their wards in a manner becoming their rank and status in society (*c*). So, also, where the father has permitted the maintenance and education of his children to be supplied from a strange source, and has allowed them to be brought up with expectations founded on such maintenance and education which he himself could not have afforded, he will not be at liberty to deprive them of that source of education, the effect of which has been materially to alter their expectations (*d*).

(b) Religious.—There is no duty imposed upon the parents to educate their children in particular religious opinions, or to instil any religious views at all into them. The following remarks suppose that the children have been or are intended to be brought up with some religious belief.

It has been clearly established that except under special circumstances, the father during his life had the right to choose in what religion his children were to be brought up (*e*), even where the children were illegitimate; and if the Court in its discretion thinks that it will not be for their benefit that their religious education should be disturbed, it will refuse to deliver them up after the father's death out of the custody of the persons chosen by him to that of their mother (*f*). He cannot after his death directly prescribe in what religion they shall be brought up, but he can indirectly do so by appointing a testamentary guardian of that faith in which he desires they should be reared and educated (*g*). This right to have his children brought up in his own religion the father cannot release; nor

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(*b*) *Hodges* v. *Hodges*, Peake, Add. Cas. 79.

(*c*) See *post*, Guardian and Ward, chap. v.

(*d*) Macph. Inf. 136, citing *Colston* v. *Morris*, Jac. 257 n, and other cases.

(*e*) *Hawksworth* v. *Hawksworth*, L. R. 6 Ch. App. 539; 40 L. J. Ch. 534; *Re Agar-Ellis*, *Agar-Ellis* v. *Lascelles*, 10 Ch. D. 49; 48 L. J. Ch. 1; *Re Scanlan*, *(Infants)*, 40 Ch. D. 200; 57 L. J. Ch. 718.

(*f*) *Re Ullee*, 54 L. T. 286.

(*g*) *Talbot* v. *Earl of Shrewsbury*, 4 M. & C. 672; *Witty* v. *Marshall*, 1 Y. & C. C. C. 68; *Austin* v. *Austin*, 34 L. J. Ch. 192, 499.

can he bind himself conclusively by contract to exercise in all events in a particular way rights which the law gives him for the benefit of his children, and not for his own (*h*). Thus, an ante-nuptial agreement between a husband and wife of different religious opinions, that the children should be brought up in a faith other than that of the father, is not binding in law or in equity (*i*); it is a mere consent on the part of the father, and may be revoked by him (*k*). This right of the father to have his children educated in his own religion is recognized after his death, even though he die intestate, and without leaving any directions as to the religion in which they are to be educated; the Court presumes that the father intended their religious training should be continued in his faith (*l*); but the House of Lords has laid down that on the question of religion the welfare of the child forms the paramount consideration; the wishes of the father are to be considered, and if there is no other matter to take into account the wishes of the father prevail, but if a sufficient case is made out for going contrary to the father's wishes the Courts will not hesitate to do so (*m*). Though the Guardianship of Infants Act, 1886, made the mother on the death of the father the legal guardian of her children where the father had not appointed a guardian, she did not possess any greater power or control over their religious education than that possessed by an ordinary guardian at the time of the passing of the Act; and except for any special circumstances she was bound to bring up the child in the religious faith of the father though of a different faith herself (*n*). So, too, if the child were a ward of Court, it was the duty of the Court to take care that its fatherless ward was brought up in the religion of the father. This rule of law was enforced even where it might lead to the creation of a barrier between mother and child, causing pain and grief to both (*o*). The rights of the father and the mother are equalized and the rights of

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(*h*) *Andrews* v. *Salt*, L. R. 8 Ch. App. 622; *Re Meades*, 5 Ir. Eq. 98.

(*i*) *Andrews* v. *Salt* (*ubi sup.*); *Re Agar-Ellis, Agar-Ellis* v. *Lascelles* (*ubi sup.*).

(*k*) *Reg.* v. *Smith*, 22 L. J. Q. B. 116.

(*l*) *Austin* v. *Austin* (*ubi sup.*); *Hawksworth* v. *Hawksworth* (*ubi sup.*); *Skinner* v. *Orde*, L. R. 4 P. C. 60; *Re Newbery*, L. R. 1 Ch. App. 263; 35 L. J. Ch. 330. In these last two cases the mother had changed her religion. See *F.* v. *F.*, [1902] 1 Ch. 688; 71 L. J. Ch. 415.

(*m*) *Re Ward, Ward* v. *Laverty*, [1924] 2 Ir. R. 122.

(*n*) *Re Scanlan* (*Infants*), 40 Ch. D. 200; 57 L. J. Ch. 718; *Re McGrath* (*Infants*), [1893] 1 Ch. 143; 62 L. J. Ch. 208.

(*o*) Per Wickens, V.-C. of Duchy of Lancaster, in *Hawksworth* v. *Hawksworth*, L. R. 6 Ch. App. 539; 40 L. J. Ch. 534.

guardians appointed by either the mother or the father are equal under the Guardianship of Infants Act, 1925 (*p*), as to the up-bringing of an infant, and in the event of any dispute arising the Court has the duty imposed upon it of saying what the welfare of the child demands. The mere fact that the mother professes a faith differing from that in which her child, being of tender years, is to be brought up, forms no ground for separating them (*q*), unless the child has reached the age of intelligence, and has conceived such strong and fixed religious ideas that to change and disturb them would be to the child's detriment (*r*). Such an agreement between husband and wife (whether ante-nuptial or post-nuptial) does not amount in law to a delegation or substitution of the paternal rights, and though a separation deed is not rendered invalid which provides for the father giving up the custody of his child, yet he may resile from it, and the Court will not enforce it against the interests of the child (*s*). But if a father by a separation deed has agreed that the mother shall have the absolute custody and control of his infant child, and has delegated to her the right of directing the child's religious education, and if it is for the infant's benefit that effect should be given to the agreement, the Court will enforce it under section 2 of the Infants' Custody Act, 1873 (*t*). So, too, in the case of an infant orphan the Court looks altogether to the benefit of the child, and though the father may have agreed that his child should be brought up in a faith not his own, yet if his conduct shows that he has changed his mind, and it is for the infant's benefit and interest that it should be brought up in the father's faith, the Court will appoint guardians for the purpose of its being brought up in the father's religion (*u*).

Rights of Widowed Mother.—In the case of a widowed mother whose dead husband has not directed any particular religious education for his child, she has the right to decide in what faith her offspring shall be educated; and where she changes her mind as to the school in which the infant is being brought up and desires to remove him from that school, she can enforce her right by *habeas corpus* unless detriment to

(*p*) 15 & 16 Geo. V. c. 45.
(*q*) *Corbett* v. *Tottenham*, 1 Ba. & B. 59; *Re Browne*, 2 Ir. Ch. Rep. 151; *Austin* v. *Austin* (*ubi sup.*).
(*r*) *Re Besant*, 11 Ch. D. 508, 519; 48 L. J. Ch. 497.
(*s*) *Re Besant* (*ubi sup.*); 36 Vict. c. 12, s. 2.
(*t*) *Condon* v. *Vollum*, 57 L. T. 154.
(*u*) *Re Nevin* (*an Infant*), [1891] 2 Ch. 299; 60 L. J. Ch. 542.

the morals of the child would result (*x*). Where a mother whose husband is not known to be dead or alive has put her infant child to a school of a particular religious faith, and afterwards changes her views and desires to remove him, she is entitled to her writ of *habeas corpus* to regain control of her child, if the manager of the school refuses to deliver him up, unless its interests would be injuriously affected (*y*).

Custody of Children Act, 1891.—This right of the parent to prescribe in what religious faith the child is to be educated is one that is most clearly recognized, for even where the parent is deemed unworthy by reason of misconduct to have the custody of the child, the Court of Chancery, under the Custody of Children Act, 1891 (*z*), if it is shown that the child is being brought up in a different religion to that in which the parent has a legal right to have him brought up, may secure that the child be brought up in the parent's religion; though in such a case the Court may consult the wishes of the child (*a*).

Children Act, 1908.—Where a child has been committed to the custody of a person other than the parent, in consequence of a conviction against or committal for trial of the parent, the Court in determining to whose care the child shall be committed is directed to ascertain the religious persuasion to which the child belongs, and to select if possible a person of the same religious persuasion, or a person who will give an undertaking that the child shall be brought up in such religious persuasion, which is to be specified in the order (*b*).

Interference by the Court.—But under special circumstances the Courts have power to interfere with and control the parental right. Where the parent by his conduct, evidenced by his assent or non-dissent, has abandoned, forfeited, or waived this right, whether in pursuance of an agreement or not, and allowed the child to be reared in a faith not his own, the Court will consider only the happiness and benefit of the child, though it may not have imbibed so thoroughly the doctrines in which it has been raised up as to make it dangerous to change its religious training (*c*). So where the acts of a deceased Protestant father indicated that he had not only abandoned his right to have his

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(*x*) *Reg.* v. *Williams*, 58 L. J. Q. B. 176.
(*y*) *Reg.* v. *Barnardo (Brookes' Case)*, 58 L. J. Q. B. 552.
(*z*) 54 Vict. c. 3.
(*a*) Sect. 4. See *Reg.* v. *Gyngall*, [1893] 2 Q. B. 232; 62 L. J. Q. B. 559.
(*b*) 8 Edw. VII. c. 67, s. 23.
(*c*) *Andrews* v. *Salt*, L. R. 8 Ch. App. 622.

child brought up in his own faith, but that he intended that it should be brought up in the Roman Catholic faith, and the Court was of opinion that it would be most for the benefit of the child to be brought up in the latter faith, its education in that faith was continued (*d*). But where the parent has not abandoned or forfeited his rights, the Court has no power to inquire whether the enforcement of his rights would or would not be for the happiness and benefit of his child (*e*). No definition can be framed of what is a forfeiture or abandonment by the parent; but it is a question on which the Court must pronounce from the facts proved in evidence before it (*f*). It may be seen from the cases cited below that the Court has frequently applied the rule where the father is dead, but where he is alive, even though he had apparently waived his rights, it would hesitate long before it acted upon the waiver, if it did not altogether refuse to do so (*g*), except where manifest injury to the child would result (*h*). But if he has allowed the child to reach such an age that it has imbibed strong religious opinions, the Court would refuse to sanction the alteration of the religious views of its ward (*i*). An ante-nuptial agreement by a father waiving his rights, which had been acted upon by him, would after his death, though legally not binding on him, be taken into consideration as affording evidence of such abandonment and waiver (*k*), and if the child has imbibed strong religious opinions so that to alter its religious views might be to imperil them altogether, the Court will refuse to decree such change (*l*). The Court would apply these principles to the case of a child whose widowed mother had for a long time abdicated her right to control its religious education (*m*). In case of any difference between the parents, the guardians, or parent and guardian respectively, under the equal rights conferred upon them or recognized as possessed by them by the Guardianship of Infants Act, 1925 (*n*), the Court is directed not to consider that the claim of either

(*d*) *Re Clarke*, 21 Ch. D. 817; 51 L. J. Ch. 762.
(*e*) *Andrews* v. *Salt* (*ubi sup.*).
(*f*) *Hill* v. *Hill*, 31 L. J. Ch. 505; *Re Meades*, 5 Ir. Eq. 98; *Re O'Malleys*, 8 Ir. Ch. Rep. 291; *Re Garnett*, 20 W. R. 222; *Andrews* v. *Salt* (*ubi sup.*); *Re Agar-Ellis*, *Agar-Ellis* v. *Lascelles*, 10 Ch. D. 49; 48 L. J. Ch. 1.
(*g*) *Re Meades* (*ubi sup.*). See *Re Besant*, 11 Ch. D. 508; 48 L. J. Ch. 497.
(*h*) *Thomas* v. *Roberts*, 19 L. J. Ch. 506. See *Re Newton* (*Infants*), [1896] 1 Ch. 740; 65 L. J. Ch. 641.
(*i*) *Re Newton* (*Infants*) (*ubi sup.*).
(*k*) *Andrews* v. *Salt*, L. R. 8 Ch. App. 622.
(*l*) *Stourton* v. *Stourton*, 26 L. J. Ch. 354; *Re Newton* (*Infants*) (*ubi sup.*).
(*m*) See *Reg.* v. *Williams*, 58 L. J. Q. B. 176.
(*n*) 15 & 16 Geo. V. c. 45.

parent is superior to that of the other and is to regard the welfare of the infant as the first and paramount consideration (*o*).

Examination of Child by the Court.—The Court, in former days, if it thought fit, was wont to examine the child privately to ascertain whether or not it had received such definite impressions as would render a change dangerous (*p*). The more recent practice was certainly to discountenance such private examination as not being conducive to the child's welfare, for it might tend to inculcate controversial opinions in its mind, especially where the father is alive (*q*); yet under the Custody of Children Act, 1891 (*r*), and the Children Act, 1908 (*s*), the Court has power to inquire into the religious opinions of the child; and the Court will take upon itself to interview a young child of fifteen for the purpose of ascertaining its religious views (*t*). The Court will, however, disregard the opinions of a mere child of eight years old or thereabouts (*u*).

Summary.—To sum up this branch of the subject. (1) The father cannot make a binding contract to bring up or not to bring up his children in a particular faith. (2) Where the parent has not abandoned, or forfeited, or waived his rights, the Court has no power to inquire whether the enforcement of the parental rights would or would not be for the happiness and benefit of the child. (3) If, on the contrary, he has abandoned or forfeited his rights (whether in pursuance of an agreement or not), the Court will consider only the happiness and benefit of the child, and order it to be continued to be educated in the religion in which it had been brought up, and the child need not have imbibed so thoroughly the doctrines inculcated into it as to make it dangerous to change its religious training. (4) Where a father has died leaving no directions for the religious education of his children, who since his death have been thoroughly educated in opinions other than the father's, and who have arrived at such an age that to alter their course of teaching would be perilous to their religious faith,

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(*o*) 15 & 16 Geo. V. c. 45, s. 1.

(*p*) *Stourton* v. *Stourton* (*ubi sup.*).; *Re Hunt*, 2 Con. & Law, 373.

(*q*) *Hawksworth* v. *Hawksworth*, L. R. 6 Ch. App. 539; 40 L. J. Ch. 534; *Re Agar-Ellis, Agar-Ellis* v. *Lascelles*, 10 Ch. D. 49; 48 L. J. Ch. 1.

(*r*) 54 Vict. c. 3, s. 4.

(*s*) 8 Edw VII. c. 67, s. 23.

(*t*) *Reg.* v. *Gyngall*, [1893] 2 Q. B. 232; 62 L. J. Q. B. 559. See *Re Newton (Infants)* (*ubi sup.*); and *F.* v. *F.*, [1902] 1 Ch. 688; 71 L. J. Ch. 415.

(*u*) *Witty* v. *Marshall*, 1 Y. & C. C. C. 68; *Davies* v. *Davies*, 10 W. R. 245; *Re Hunt* (*ubi sup.*) (girl fifteen years old); *Re Newbury*, L. R. 1 Eq. 431 and 1 Ch. App. 263; 35 L. J. Ch. 330; *Hawksworth* v. *Hawksworth* (*ubi sup.*).

the Court will not decree that they should be educated in their father's religion. (5) An agreement by a father to surrender his control over the custody and education of his children will be taken into consideration by the Court after his death, as to whether or no he has abandoned his right to educate his children in his own religion. (6) The Court will examine the children for the purpose of eliciting their religous opinions, but will disregard those of infants of tender age.

CHAPTER III.

RIGHTS AND OBLIGATIONS OF PARENTS WITH RESPECT TO THE PROPERTY OF CHILDREN.

This chapter deals with the rights of parents as far as they extend over the property of their children; and the duties and obligations laid upon them to protect and safeguard it, and not in any way to use their position to prejudice the interests or fortunes of their offspring. The chapter according to its subject-matter is divided into three sections. (1) Rights of Parents over Child's Property; (2) Gifts and Transactions between Parent and Child; (3) Transactions in Fraud of Parental Rights.

Section 1.

Rights of Parents over Child's Property.

Rights of Father as to Real Estate.—The rights of a father over the realty accruing to his infant child by *purchase* have not been defined with much clearness or at any length, both because the father was by the common law guardian in socage of any socage land which came to his child by *descent*, and so had superintendence of it (*a*); and because before the Statute of Wills (*b*), which gave for the first time a power of testamentary alienation over real estate, there must have been very few instances of an infant being enfeoffed by deed *inter vivos* of land which he could not manage (*c*). Blackstone, citing Coke, says (*d*): "If an estate be left to an infant, the father is by common law the guardian, and must account to his child for the profits" (*e*); and "a father has no other power over his son's estate than as his trustee or guardian, for though he may receive the profits during the child's minority, yet he must account for them when he comes of age" (*f*). Fitzherbert (*g*) also says

(*a*) See *post*, Part III. chap. ii.
(*b*) 32 Hen. VIII. c. 1.
(*c*) Macph. Inf. 65.
(*d*) Co. Litt. 88.
(*e*) 1 Com. 461.
(*f*) *Ibid.* 453.
(*g*) F. N. B. 117.

that where the father occupies the land of the infant which the infant has by purchase, the infant shall have an account against him as bailiff of his lands. It may, then, be taken to be the law that where a father enters on the estate of his infant children, he is presumed to do so as bailiff or guardian, and in a fiduciary position (*h*); and a decree ordering an account of the profits will be made against him (*i*), though such an account may be presumed to have been settled where the child has lived for many years with the father, and the rents have been applied in maintaining the common establishment (*k*). The Statute of Limitations will not run in favour of the parent as against the child until the latter has reached majority (*l*).

The father acquires no legal or beneficial interest in the real estate by reason of his control and superintendence as natural guardian (*m*). A father who is tenant for life of his children's property will be in no better position than an ordinary tenant for life, and as tenant by the curtesy he may be restrained from committing waste (*n*). As to the new provisions relating to the interest of infants in real estate under the Settled Land Act, 1925, see *post*, p. 700. When a child became entitled to an estate, and died intestate and without issue in his father's lifetime, the latter until January 1, 1926, succeeded to the property as the nearest lineal ancestor entitled to take (*o*).

Rights of Mother.—Where a mother enters upon the land of her children, her position, with respect to them, is, like the father's, that of a trustee, and she will be accountable as such, and all the rights of a *cestui que trust* will be enforced against her in favour of her children (*p*). On the death of a child intestate, and without issue, entitled in fee, and on the exhaustion of all paternal heirs whatsoever, the mother is entitled to succeed to her child as the nearest lineal ancestor entitled to take (*q*), and this right is not affected by the new law of succession if the child leave no husband or wife surviving.

Personal Property.—As a rule, the parent has no rights over the child's general property of a personal nature, and property

(*h*) *Re Hobbs, Hobbs* v. *Wade*, 36 Ch. D. 553; 57 L. J. Ch. 184.
(*i*) *Morgan* v. *Morgan*, 1 Atk. 489.
(*k*) *Smith* v. *Smith*, 23 Beav. 554.
(*l*) *Re Hobbs, Hobbs* v. *Wade* (*ubi sup.*); *Wall* v. *Stanwick*, 34 Ch. D. 763; 56 L. J. Ch. 501; *Tinker* v. *Rodwell*, 69 L. T. 591.
(*m*) *Rex* v. *Sherrington*, 3 B. & A. 714.
(*n*) *Roberts* v. *Roberts*, Hardre. 96.
(*o*) 3 & 4 Wm. IV. c. 106, s. 6.
(*p*) *Wall* v. *Stanwick* (*ubi sup.*).
(*q*) *Wall* v. *Stanwick* (*ubi sup.*).

which comes to a child under age will (unless there is a direction to the contrary) vest in him as though he were an adult. When property comes to an infant child, and the instrument of donation does not so provide, the Court will make a vesting order in respect of such property under section 53 of the Trustee Act, 1925. In such a case the parent will usually be appointed as guardian. Where parents hold personal property belonging to their children, they are only trustees for them, and are bound to conform to the general duties and obligations imposed upon persons in a fiduciary position. Though parents are the natural guardians of their children, yet, owing to the possible abuse of that office, they are not the proper persons to receive legacies left to their infant children. Parents cannot, in consequence, give a valid receipt for the legacies so as to discharge the executors. The latter can no more justify paying a legacy to the parents of an infant than to the infant himself, unless the testator has marked out the parents as the proper persons to receive the legacies (*r*), or they act under the sanction of the Court of Chancery (*s*); and payment to the father of a child who has not attained majority is not good, even where the child after age ratifies the payment by his course of conduct (*t*). Where the parent is the person marked out to receive the legacy, he is deemed to be a trustee for the child, and entitled to receive the money, and his receipt will be a good discharge to the executor (*u*). The goods of an infant son living with his father are not in the order and disposition of the latter so as to pass to his trustee in bankruptcy (*x*).

Right of Father to Earnings of Child.—It is a doubtful point whether or not the father is entitled to the earnings of his child. He certainly cannot claim them legally after the child has reached the age of sixteen. The parents among the artizan classes do, it is well known, take their children's earnings and throw them into the common stock for the support of the family. If the father once reduces the wages of the child into his possession, there cannot be any doubt that the child will be unable to recover them. Blackstone says: "He (the

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(*r*) *Cooper* v. *Thornton*, 3 Bro. C. C. 96, 186. See *post*, Part III. chap. vi.

(*s*) *Dagley* v. *Tolferry*, 1 P. Wms. 285; S. C. *Doyley* v. *Tolferry*, 1 Eq. Cas. Abr. 300, pl. 2; S. C. *Dawley* v. *Belfrey*, Gilb. Eq. Rep. 103; *Hill* v. *Chapman*, 2 Bro. C. C. 612.

(*t*) *Cooper* v. *Thornton* (*ubi sup.*).

(*u*) *Fane* v. *Fane*, 1 Vern. 30; *Cooper* v. *Thornton* (*ubi sup.*).

(*x*) *Viner* v. *Cadell*, 3 Esp. 88.

father) may indeed have the benefit of his children's labour while they live with him, and are maintained by him; but this is no more than he is entitled to from his apprentices or servants" (*y*). This proposition must be limited to children who are living with, and being reared and nurtured by, the parent, and not to those who are emancipated and are supporting themselves; and must mean that if a child work for its parent, it cannot afterwards recover on an implied contract to pay wages (*z*). But if a child enters, as he can do (*a*), into a valid contract of service with his parent for the payment of wages, the parent will not be entitled to retain such wages, but the child will be able to maintain an action for them against his parent. If the father emancipates the child from his control, any right to his earnings would at once cease to exist. The following remarks of an American writer (*b*) would seem to express rightly the law of the matter: "If a child, after arriving at the age of twenty-one years, then continues to live, labour, and render service in the father's family, with his knowledge and consent, but without any agreement or understanding as to compensation, the law raises no presumption of a promise to enable the child to maintain an action against the father to recover compensation. The presumption here is, that the parties do not contemplate a payment of wages for services on the one hand, or a claim for board and lodging on the other; for where the relation of parent and child exists, the law will not readily assume that of debtor and creditor likewise. But this presumption may be overthrown, and the reverse established, by proof of an express or implied contract; an implied contract being proven by facts and circumstances which show that both parties, at the time the services were performed, contemplated or intended pecuniary recompense." But such intention would need to be clearly shown; and in one case (*c*) a son who was placed by his father in business, accounting to his father for all the profits, deducting only the expense of his board, having

(*y*) Com. 453; Wood, Inst. Laws. Eng. 65.

(*z*) There is a case of *Ex parte Macklin*, 2 Ves. Sen. 675, which very nearly touches this point, but the report is obscure. See *Duckworth* v. *Johnson*, 4 H. & N. 653.

(*a*) *Rex* v. *Chillesford*, 4 B. & C. 94.

(*b*) Sch. Dom. Rel. s. 269, and the cases there cited.

(*c*) *Plume* v. *Plume*, 7 Ves. 258. It is true in this case that the father had left his son a legacy to a greater amount than his claim, but the Lord Chancellor (Eldon) was of opinion that apart from that circumstance the father had never looked upon his son in the relation of a creditor.

made no demand for wages during his father's life, was held not entitled as a creditor after his father's death.

Rights of Mother.—If the father has the right to take his child's earnings, the mother would likewise have the right to do so in a modified manner. Her right would not exist in cases where the father was supporting and maintaining his children, for she is then under no obligation to provide for their sustenance, and reciprocally could not legally claim to be indemnified for her toil and trouble. Where she is a widow, and her children are under sixteen, she is bound to support them, and her right to their wages and earnings would be established on the same foundation as that of the father. Again, under the Married Women's Property Act, 1882 (*d*), if she has any property she is liable for the support of her children and grandchildren (though the primary liability of the husband still exists); it would, therefore, follow that in a case where she was bound to support her children, she would be entitled to the earnings of any child under the age of sixteen living with and supported by her.

Right of Stepfather.—Whatever right and title there may be in the parents to take the earnings of their children would extend in the case of a step-father to the earnings of his step-children, at any rate up to the age of sixteen; for by law he is bound to support them till they reach that age (*e*), and a step-parent is one of the persons liable under the Children Act, 1908, for the support of a youthful offender (*f*). The step-father is *in loco parentis* to the step-child; and neither can he ask for compensation out of the fortune of the child for affording means of subsistence, nor can the child, if it has rendered services, claim compensation for them, as though their mutual position had been that of master and servant, unless the child, being of age, has stipulated to be rewarded for his services.

Rights of Parents on Death of Child.—Where a child, minor or adult, died before January 1, 1926, unmarried and intestate possessed of personal property, the father took the whole of it to the exclusion of the mother and brothers and sisters, and other next-of-kin; and if there were no nearer relation than the grandfather, then the grandfather took the whole. If the child left a widow, but no children, the father and the widow shared his property equally.

(*d*) 45 & 46 Vict. c. 75, s. 21.
(*e*) 4 & 5 Wm. IV. c. 76, s. 57.
(*f*) 8 Edw. VII. c. 67, s. 125.

The right of the mother to succeed under the Statute of Distributions (*g*) to her child's personal estate, in the event of its dying intestate, was somewhat complicated; and the amount of her interest in the property depended altogether upon the number and propinquity in blood of the next-of-kin. If the child died intestate and left no child, father, brother, sister, nephew, or niece, then the mother took the whole; if the child left a widow, but no child, father, brother, sister, nephew, or niece, then the mother and the widow shared his property equally. If the child left a brother or sister, or a brother and sister, the property was divided equally between the mother and her other child or children as the case might be. If the child left a widow, and brothers and sisters, the mother shared in equal proportion with the brothers and sisters in half of the intestate's property. If the child left a widow and nephews and nieces, the mother took a fourth of his property.

Grandparents, paternal and maternal, took in equal shares, and where the grandmother is the sole surviving nearest relation she would take the whole; thus, a grandmother would take in preference to an uncle or an aunt. Posthumous relations are in the same postion as those born in the lifetime of both their parents; half-blood relations had formerly the same rights as those of the whole blood, but under the new law of succession the half blood is postponed to the whole blood.

Rights of Child on Death of Parent.—In the English legal system there is no indefeasible right of inheritance in a child to its parents' property, whether real or personal. There is no provision in the English jurisprudence against an "undutiful will" (*inofficiosum testamentum*); and if a parent choose to cut his child or children out of his will, he is free to do so; and the terms of his will will be enforced. If a parent died before January 1, 1926 (the coming into operation of the Administration of Estates Act, 1925 (*h*)) intestate, seised of real property in fee simple, and left an only son, that son took (subject to any dower or curtesy right that might be enforceable by his surviving parent); if such parent died intestate, leaving more than one son, the eldest son took the realty to the exclusion of his brothers and sisters. If such parent died intestate and left an only daughter she took the realty (subject to the above rights);

(*g*) 22 & 23 Car. II. c. 10, repealed by 15 Geo. V. c. 23.
(*h*) 15 Geo. V. c. 23.

if the parent died intestate and left more than one daughter, all the daughters took as coparceners, or joint owners, any one of whom could sever her joint interest without the consent of the others.

If a parent died intestate leaving personalty and an only child (but no widow or husband) such child took the whole of the property; if more than one child, then in equal shares under the Statute of Distributions (*i*); but the descendants of children who had died in the intestate's lifetime stood in the place of their parents or ancestors (*k*).

New Law of Inheritance.—For the new law of distribution of the estate of a person dying intestate after December 31, 1925, see *post*, c. iv., p. 569.

Right of Parent to Insure Life of Child.—A father has no insurable interest in the life of his child on the mere ground of ties of blood or affection (*l*). The interest must arise out of some subsisting right of property, which may be prejudicially affected by the occurrence of the event assured against, and which whether in possession, in reversion, or contingent, would give the assured a standing in a Court of equity if the title were in question (*m*). If the father has a pecuniary interest in his son's life, as where property is divested from him on the death of his son, or even where the son is his debtor, he may effect an insurance on his life; and if a father (and after his death possibly the mother) wishes to give his child some property to dispose of, he may make an insurance on his child's life in his (the child's) name, not for his own (the father's) benefit, but for the benefit of his child, and there is no law to prevent him doing so (*n*). Though a policy may be void as between the contracting parties for want of insurable interest, yet if the father receive the money from the insuring office, he can retain it as against the child's creditors (*o*). A person who keeps an infant under the age of seven years for reward, has no insurable interest in the life of the infant (*p*). An adult child has no greater insurable interest in the life of his parent, as such, than

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(*i*) 22 & 23 Car. II. c. 10, s. 5.
(*k*) See *Ross' Trusts*, 13 L. R. Eq. 286; 41 L. J. Ch. 130.
(*l*) Under 14 Geo. III. c. 48, s. 3.
(*m*) *Halford* v. *Kymer*, 10 B. & C. 724; 8 L. J. (o.s.) K. B. 311; *Worthington* v. *Curtis*, 1 Ch. D. 419; 45 L. J. Ch. 259; followed in *Att.-Gen.* v. *Murray*, [1904] 1 K. B. 165; 73 L. J. K. B. 66.
(*n*) *Halford* v. *Kymer* (*ubi sup.*).
(*o*) *Worthington* v. *Curtis* (*ubi sup.*).
(*p*) Children Act, 1908, c. 7.

the parent has in the life of the child; but a like pecuniary interest is necessary to make the assurance valid (*q*).

Section 2.

Gifts and Transactions between Parent and Child.

A gift of property by an infant to its parent would, as in the case of a gift to a stranger, be voidable by the infant, and might be recalled by him within a reasonable time after attaining his majority. A gift from an adult child to its parent is as perfect and valid a transaction as a gift from him to a stranger; but where the transfer to the parent is by way of gift or improvident contract soon after the child has reached majority, then the suspicions of the Courts administering equity are aroused. The principle upon which a Court of equity acts in such a case, is to presume that where a transaction takes place between parent and child just after the latter has attained twenty-one, and prior to what may be called a complete emancipation, without any benefit moving to the child, an undue influence has been exercised to procure that benefit or advantage from the child, and a party who seeks to maintain such a transaction must show that the presumption is adequately rebutted (*r*). Undue influence is the sense of power and authority on the one side, and dependence on the other, that tempts the stronger to ply his opportunity and exceed his duty.

The law on this subject is well laid down by Lord Justice Turner in *Wright* v. *Vanderplank* (*s*), who said: "A child may make a gift to a parent, and such a gift is good if it is not tainted by parental influence. A child is presumed to be under the exercise of parental influence as long as the dominion of the parent lasts. Whilst that dominion lasts, it lies on the parent maintaining the gift to disprove the exercise of parental influence by showing that the child had independent advice, or in some other way. When the parental influence is disproved, or that influence has ceased, a gift from a child stands on the same footing as any other gift; and the question to be determined is whether there was a deliberate, unbiassed intention on the part of the child to give to the parent." Thus, when a son,

(*q*) *Howard* v. *Refuge Friendly Society*, 54 L. T. 644.
(*r*) *Archer* v. *Hudson*, 7 Beav. 551.
(*s*) 27 L. T. (o.s.) 91.

soon after attaining his majority, makes over property to his father without consideration, or for an inadequate consideration, equity will require the father to show that the son was a free agent, and had adequate and independent advice (*t*). But, on the other hand, if the child can be proved to be a free agent, the gift from the child to the parent will be maintained (*u*); thus, in a case where about six months after a daughter came of age, the creditor of her father obtained from her securities for his debt, it was held that as the creditor had not used any undue or fraudulent means, or availed himself of the fraud of any other party to procure payment, the mere fact of a daughter voluntarily paying the debt of her father who was in difficulties, was not, in itself, ground for imputing undue influence to the father (*x*). The circumstances of the case are to be taken into consideration in judging of the fairness of an arrangement between parent and child, and the mere fact that it was for the advantage of the parent is insufficient to set it aside, though the child executed it soon after coming of age (*y*). But where a father, tenant for life, takes advantage of his son's (tenant in tail) necessities to draw him in to join in any conveyance which would destroy his remainder, the Court, upon very slender evidence of such a practice, would relieve the son (*z*); and where a child living under the influence of a parent executes a settlement under which the parent derives an advantage, the child ought to be separately advised (*a*); for in such a case the jealousy of the Court is aroused; but the taking of the benefit by the parent does not necessarily become unfair, and if unfair does not vitiate the whole of the arrangement (*b*). This interference on the part of equity is exercised in virtue of the jurisdiction of the Court of Chancery in watching over and protecting those who are placed in a situation to require protection as against the acts of those who have influence over them, by which acts the person having such influence obtains any benefit to himself. The Court interferes "upon the ground of the close attention, the strictness, and the jealousy with which, upon principles of natural justice, and upon consideration important to the

(*t*) *Savery* v. *King*, 5 H. L. Cas. 627.
(*u*) *Blackburn* v. *Edgeley*, 1 P. Wms. 600.
(*x*) *Thornber* v. *Sheard*, 12 Beav. 588 : and see *Firmin* v. *Pulham*, 2 De G. & S. 99.
(*y*) *Bellamy* v. *Sabine*, 17 L. J. Ch. 105.
(*z*) *Wallace* v. *Wallace*, 2 Dr. & W. 452; see *Rhodes* v. *Cook*, 4 L. J. Ch. 147.
(*a*) *Tucker* v. *Bennett*, 38 Ch. D. 1; 57 L. J. Ch. 507.
(*b*) *Hoblyn* v. *Hoblyn*, 41 Ch. D. 200.

interests of society, the law of this country examines, scrutinizes, and if I may borrow an old expression, weighs in golden scales every transaction between a guardian and his ward, or between a parent and his child, which, including or consisting of a gift from the younger to the elder, takes place so soon after the termination of the legal authority, as that the ward or child may, in consequence, probably be—not in the largest or amplest sense of the term—not, in mind as well as in person, an entirely free agent" (*c*). This jealousy is more than ever evinced where the inception of the transaction was during the minority of the child. A mortgage and subsequent sale of property executed by a son a very short while after attaining majority under the influence of his father was set aside as being prejudicial (*d*). Where a parent sets up a deed under such circumstances, two things are required of him: (a) that the deed was the real and actual deed of the child, and was intended by the child to have the operation that it has; (b) and that the intention was fairly produced. The legitimate influence brought to bear by a parent on the child is not discountenanced by the Court; but it must be exercised for the benefit of the child subjected to it, and not of the parent possessing it. Undue influence is not necessarily presumed (*e*); and where it can be shown that the child was a free agent, the gift will be upheld (*f*). But where a son gives all his property to his father, the latter undertaking to pay the son's debts, the presumption is that the surplus (if any) belongs to the son in the absence of proof to the contrary (*g*). Again, where a deed conferring a benefit on a father is executed by a child who is not emancipated from the father's control (though of age), if the deed is subsequently impeached by the child, the onus is on the father to show that the child had independent advice, and executed the deed with full knowledge of its contents and with the free intention of giving the father the benefit conferred. If this onus is not discharged the deed will be set aside. This onus extends to a volunteer claiming through the father and to any person taking with notice of the circumstances which raise the equity, but no further (*h*).

(*c*) Per Knight Bruce, L.J., in *Wright* v. *Vanderplank*, 27 L. T. (o.s.) 137. See also *Turner* v. *Collins*, L. R. 7 Ch. 329; 41 L. J. Ch. 558.
(*d*) *Savery* v. *King*, 5 H. L. Cas. 627.
(*e*) *Rhodes* v. *Cook* (*ubi sup.*); *Thornber* v. *Sheard* (*ubi sup.*).
(*f*) *Blackburn* v. *Edgeley*, 1 P. Wms. 609.
(*g*) *May* v. *May*, 33 Beav. 81.
(*h*) *Bainbrigge* v. *Brown*, 18 Ch. D. 188; 50 L. J. Ch. 522.

Persons in loco parentis.—The above rules apply where the recipient of the gift, or person taking a benefit under the contract, is *in loco parentis* to the person acting under his influence (*i*), as, for instance, an uncle and a niece brought up in his house (*k*), also, an elder brother who has had the care and superintendence of his younger brother and sisters. If a stranger, knowing of the circumstances of the transaction, takes a benefit under it, it will be set aside as against him (*l*); but not if he is ignorant of the real nature of the transaction (*m*). The law to be applied is clear, but when and in what manner depends upon the circumstances of each case. It would be impossible to give an exhaustive list of what facts are to be taken into consideration in arriving at a conclusion, because each case must be determined according to its own merits and surroundings: but there are some which would always be common in every instance brought before the Court for investigation on an application to set aside the transaction, such as what was the age of the child at the time of making the gift, whether just past or considerably over majority; whether living with the parent, and so directly under his control and influence, or apart from him, when the possible influence would not be so strong; also the strength or weakness of the mind and will of the child.

Family Arrangements.—There are, however, some conditions under which the parental influence is allowed to have greater force and weight than under others, and a broad distinction is drawn where family arrangements are carried out, or family disputes settled by the agreement between parent and child. If the agreement be reasonable, the Court will not set it aside, on the ground that the arrangement was to the advantage of the family (*n*). "If the settlement of the property be one in which the father acquires no benefit not already possessed by him, and if the settlement be a reasonable and proper one, the Court will support it, even though it may appear that some influence was exerted by him to induce the son to execute it; and provided also that there was no suppression of what is true, or suggestion of what is false" (*o*); and it is not essential that the child should have independent advice and the Court will

(*i*) *Beasley* v. *Magrath*, 2 Sch. & L. 31.
(*k*) *Archer* v. *Hudson*, 7 Beav. 551.
(*l*) *Ibid.*
(*m*) *Thornber* v. *Sheard* (*ubi sup.*); *Bainbrigge* v. *Brown* (*ubi sup.*).
(*n*) *Cory* v. *Cory*, 1 Ves. Sen. 19; *Stapleton* v. *Stapleton*, 1 Atk. 2.
(*o*) Per Romilly, M.R., in *Hoghton* v. *Hoghton*, 21 L. J. Ch. 482.

not inquire whether the influence of the parent was exerted with more or less force (*p*). Where family lands are settled in strict settlement, of which the father is tenant for life, and the eldest son is tenant in tail in remainder, it is a most common arrangement for the eldest son, on attaining majority, either on marriage or in consideration of a present advance, or some other consideration, to agree to reduce himself to a tenant for life, with remainder to his eldest son and other sons in tail; an arrangement of this kind is upheld, though the son gives up some of his rights, as being for the benefit of the family in preserving the estates (*q*). Again, where there is a family dispute, an arrangement based on a compromise will be upheld (*r*); or where there is a mutual benefit accruing to father and child (*s*). But the son must have a reasonable knowledge and appreciation of what he is doing (*t*), and the father must not alone take a benefit under the arrangement, otherwise it will be set aside (*u*). The Court must be satisfied by clear and unequivocal evidence that the nature of the transaction was understood, if it is to stand (*x*).

A transaction vitiated by undue parental influence will be set aside, as against a third person, if he take a benefit under it knowing of the circumstances existing between parent and child (*y*); but such knowledge on his part must be actual and not merely constructive (*z*). These gifts or transactions, which might have been set aside within a reasonable time of their taking place, may become confirmed and binding by acquiescence (*a*), or by the persons who had the right to set them aside acting on them (*b*), or recognizing them as valid (*c*), or allowing third persons to acquire rights under them (*d*).

Gifts from Parent to Child.—A gift from a parent to a child is as valid and perfect as from one stranger to another. When

(*p*) *Hoblyn* v. *Hoblyn*, 41 Ch. D. 200.
(*q*) *Hoghton* v. *Hoghton* (*ubi sup.*).
(*r*) *Partridge* v. *Smith*, 9 Jur. (N.S.) 742.
(*s*) *Bosville* v. *Middleton*, 29 L. T. 4 (O.S.) 742.
(*t*) *Meadows* v. *Meadows*, 16 Beav. 401.
(*u*) *Palmer* v. *Wheeler*, 2 Ba. & B. 18.
(*x*) *Davies* v. *Davies*, 4 Giff. 417.
(*y*) *Archer* v. *Hudson*, 7 Beav. 551; *Savery* v. *King*, 5 H. L. Cas. 627; see also *Palmer* v. *Wheeler* (*ubi sup.*). In *Hannah* v. *Hodgson* (9 W. R. 729), the Court refused to assist a purchaser in getting in the outstanding legal estate of a property which a father and son had concurred in selling, the father getting the whole of the purchase money.
(*z*) *Macqueen* v. *Farquhar*, 11 Ves. 467.
(*a*) *Turner* v. *Collins*, L. R. 7 Ch. 329; 41 L. J. Ch. 558.
(*b*) *Rogers* v. *Bruce*, Beatt. 486.
(*c*) *Wright* v. *Vanderplank*, 27 L. T. (O.S.) 91.
(*d*) *Jarratt* v. *Aldam*, L. R. 9 Eq. 463; 39 L. J. Ch. 349.

a father parts with property in favour of his son, it becomes as between them the exclusive property of the son as much as if it had been given to him for valuable consideration (*e*). The parent must have an intention of making an immediate present gift, and not a gift to take effect in the future (*f*). The mere fact that the relationship of parent and child exists between a tenant for life and a remainderman does not rebut the presumption that a tenant for life paying off a charge on the inheritance intends to keep the charge alive for his own benefit (*g*). A voluntary settlement is binding on the parent and may be enforced by the children (*h*).

Portions among Younger Children.—Some of the more important donations from parents to children are portions which are to be divided among younger children, whether to be raised out of realty by a power reserved to the parents by the settlement of the land, or out of personalty in accordance with a power of appointing a particular fund among their children, and legacies from parents to children; for a legacy coming from a parent to a child must be understood as a portion, though not described in the will (*i*). It is generally reserved to the parents to revoke any appointment made by them in favour of their child or children; but where for valuable or other consideration the appointment is declared to be irrevocable, the interest of the appointee in the property appointed is indefeasible. Where portions are given by parents or persons *in loco parentis* to younger children whose interest in them is contingent in so far as such portions are not raisable till they are wanted, though the settlement creating the portions contains no provision for the maintenance of the children, yet interest by way of maintenance will be allowed during minority or the period before the complete vesting of the portions (*k*). The amount to be allowed is in the discretion of the Court (*l*). Interest is not payable on a portion until it is raisable, though the right to it may be vested (*m*); and so maintenance cannot be allowed out of it;

(*e*) Per Sir J. Romilly, M.R., in *May* v. *May*, 33 Beav. 81, 87.
(*f*) *Re Ridgway, Ex parte Ridgway*, 15 Q. B. D. 447; 54 L. J. Q. B. 570.
(*g*) *Re Harvey, Harvey* v. *Hobday*, [1896] 1 Ch. 137; 65 L. J. Ch. 370.
(*h*) See *Langdon* v. *Blake*, 12 L. T. 202.
(*i*) *Ex parte Pye*, 18 Ves. 140; 2 W. & T. L. C. 366.
(*k*) *Re Greaves' Settled Estates, Jones* v. *Greaves*, [1900] 2 Ch. D. 683; 69 L. J. Ch. 596; Lewin on Trusts, 483.
(*l*) *Ibid.*
(*m*) *Wilcox* v. *Brown*, 2 W. R. 153.

but if the portion is raisable then the income may be applied by way of maintenance (*n*).

Equity Leaning Against Double Portions.—The aim and object of portions is to secure a competency for the younger children of the marriage (*o*); and the guiding principle of the law in reference to them is to secure an equality of division, so that while no child shall be excluded, no one shall take a double share. It not infrequently happens that a child has a portion appointed to it, and a legacy left it by the parent, or has a legacy left it and subsequently has a portion appointed to it, and the question may then arise whether the legacy or appointed portion is to be held as an additional sum in favour of the appointee or legatee, or as a satisfaction of the portion, or an ademption of the legacy. If the intention is clearly expressed no doubt can arise, as where the testator enumerated the sums to be brought into account and said no others were to be accounted for (*p*); nor can there be any doubt in cases where the specific thing devised ceases to be part of the testator's estate or subject to his right of disposition; but where the intention is merely to be inferred from circumstances difficulties arise. Where the thing ceases to conform to the description, ademption has been held to take place, as where a rentcharge was devised but the testator purchased the fee simple (*q*); or where the testator sold leaseholds accepting a mortgage in respect of part of the purchase money (*r*). But where lands were devised on trust as to the proceeds of sale and the lands were sold by the testator it was held to be an ademption of the devise but not of the trusts attached to the purchase money (*s*). In some cases, however, the subject-matter of a gift will pass under the gift even though it has been altered in form, as where shares have been sub-divided (*t*), or converted into stock (*u*), or a company has been reconstructed with its capital

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(*n*) *Knapp* v. *Knapp*, L. R. 12 Eq. 238.

(*o*) Younger children are children other than the child who has succeeded to the family estate. *Re Bayley's Settlement*, L. R. 6 Ch. App. 590.

(*p*) *In re Poyser*, [1918] 1 Ch. 573 n.

(*q*) *Re Bick, Edwards* v. *Bush*, [1920] 1 Ch. 488; 89 L. J. Ch. 335.

(*r*) *Re Richards, Jones* v. *Rebbeck*, 90 L. J. Ch. 298.

(*s*) *Gilfoyle* v. *Wood-Martin*, [1921] 1 Ir. R. 105.

(*t*) *Re Clifford Mallam* v. *McFie*, [1912] 1 Ch. 29; 81 L. J. Ch. 220; *Re Greenberry, Hops* v. *Daniell*, 55 Sol. J. 633.

(*u*) *Re Faris, Goddard* v. *Overend*, [1911] 1 Ir. R. 165.

reduced (*x*). But where there was an issue of new shares the old shares only passed (*y*).

The Court of Chancery, as administering equity, ever leans strongly against double portions, and endeavours to secure equality of division among younger children, so that one child shall not be unduly favoured at the expense of the others (*z*); and it is immaterial how the inequality in favour of one or more of the children arises.

Ademption.—Where a parent has left a legacy, and afterwards appoints a portion to that child under a power in the settlement, the legacy, unless there are reasons to the contrary, is presumed to be *adeemed*, *i.e.*, cancelled or taken out of the will (*a*). As between parent and child the presumption arises that a parent does not intend to give double portions to his children. The mere fact that the trusts of the legacy and those of the settled portion are not identical does not affect the operation of ademption (*b*). When a parent by will gives a benefit to a child and afterwards on marriage or some other event makes a settlement upon the child, the later provision is considered as an ademption of the previous gift by will unless it can be seen either by parol testimony as to the intention of the parent, or by something appearing on the documents that the child is intended to have both (*c*). A gift of a share of residue by a parent's will may be adeemed by a gift by deed of his business (part of the residue); and the mere fact that the parent retains some advantage for himself under the deed does not prevent the rule against double portions applying (*d*). The gift subsequent to the legacy (to effect an ademption) must be of the nature of a bounty on the part of a parent, such as the payment of the debts or relief from temporary embarrassments of the legatee (*e*); and if it can be shown that the subsequent gift was made in consideration and remuneration of the services of the child, the presumption against double portions is rebutted, even where it may be presumed that the subsequent gift was

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(*x*) *Re Leeming, Turner* v. *Leeming*, [1912] 1 Ch. 828; 81 L. J. Ch. 453.
(*y*) *Re Kuypers, Kuypers* v. *Kuypers* (1925), W. N. 38.
(*z*) *Ex parte Pye*, 18 Ves. 140; *Hartopp* v. *Hartopp*, 19 Ves. 184; *Re Fitzgerald's Settled Estates, Saunders* v. *Boyd*, [1891] 3 Ch. 394; 60 L. J. Ch. 624; *Montague* v. *Sandwich (Earl of)*, 32 Ch. D. 525; 55 L. J. Ch. 925.
(*a*) *Lord Chichester* v. *Coventry*, L. R. 2 H. L. 71. A residuary bequest has the same effect. *Lady Thynne* v. *Earl of Glengall*, 2 H. L. Cas. 131.
(*b*) See *Re Furness, Furness* v. *Stalkartt*, [1901] 2 Ch. 346; 70 L. J. Ch. 580.
(*c*) *Montague* v. *Sandwich (Earl of)* (*ubi sup.*).
(*d*) *Re Vickers, Vickers* v. *Vickers*, 37 Ch. D. 525; 57 L. J. Ch. 738.
(*e*) *Re Scott, Langton* v. *Scott*, [1903] 1 Ch. 1; 72 L. J. Ch. 20.

made by way of portion (*f*). This presumption does not prevail where the testamentary portion and subsequent advancement are not *ejusdem generis* (*g*). The duty of making provision for a child *prima facie* falls on the father; but the duty may fall on the mother; and the onus of proof that it does so fall lies on those who assert it (*h*). The Court of Appeal reversed this decision on further evidence being adduced (the beneficiary having accepted appointments of two sums as on account and in prepayment of her share of a fund appointed by the will) but without discussing the point decided in the Court below as to the law relating to double portions (*i*).

Satisfaction.—Where a parent appoints a portion to a child, and afterwards gives a legacy (whether certain in amount or residuary) to the same child, the presumption is, unless there are reasons to the contrary, that the portion is *satisfied* by the legacy, on the assumption that the maker of the second instrument supposed himself to be substantially satisfying the obligation of the first (*k*). Thus, if a father has made a provision by way of covenant in favour of his child before the date of his will, then, unless it appears upon the will or by parol testimony that he intends to give the benefit conferred by the will in addition to that which is already secured to the child by covenant, the child will not take both (*l*); and where an intention is plainly shown to ensure equality of treatment of all the children the Court found (apart from the presumption against double portions) that a subsequent appointment by deed of a seventh share was in lieu of the seventh appointed by will (*m*). To sum up these two rules, it may be said that a portion *adeems* a legacy or residuary bequest; and a legacy or residuary bequest *satisfies* a portion.

Distinction between Satisfaction and Ademption.—There are marked distinctions between ademption and satisfaction. In cases of satisfaction the persons intended to be benefited by the

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(*f*) *Re Lacon, Lacon* v. *Lacon*, [1891] 2 Ch. 482; 60 L. J. Ch. 403.

(*g*) *Holmes* v. *Holmes*, 1 Bro. C. C. 555; and see *Re Jaques, Hodgson* v. *Braisy*, [1903] 1 Ch. 267; 72 L. J. Ch. 197.

(*h*) *Re Ashton, Ingram* v. *Papillon*, [1897] 2 Ch. 574; 67 L. J. Ch. 84.

(*i*) *Ibid.*, [1898] 1 Ch. 142; 67 L. J. Ch. 84.

(*k*) *Ex parte Pye* (*ubi sup.*); *Earl of Durham* v. *Wharton*, 6 L. J. Ch. 17. "Satisfaction" may be defined to be the donation of a thing, with the intention, either express or implied, that it is to be taken wholly or in part, in extinguishment of some prior claim of the donee.

(*l*) *Montague* v. *Sandwich* (*Earl of*) (*ubi sup.*); *Re Scott, Scott's Trustees*, 50 Sc. L. R. 299.

(*m*) *Eardley's Will, Simeon* v. *Freemantle*, [1920] 1 Ch. 397; 89 L. J. Ch. 234.

covenant, and the persons intended to be benefited by the bequest or devise, must be the same; in cases of ademption they may be and frequently are different. Another distinction is that in the case of satisfaction the person doubly benefited must elect to take either under the covenant or the will. Difficult and intricate questions frequently arise in construing these transactions, and much depends upon the evidence of intention on the part of the donor of the benefits. The rule is much easier of application when the first provision is made by will, and the second by deed, than where the first provision is by settlement, and the will follows (*n*). In the former case the provision by will is under the absolute control of the person making it up to the time of his death. But where a parent provides for a child by a settlement binding upon him, and afterwards makes provision for him by will, he cannot substitute the legacy for the benefit conferred by the settlement without the consent of those benefited by the settlement, and thus the difficult question of what was the intention of the testator is raised (*o*). A legacy by a parent is not, however, deemed to be satisfied by occasional small gifts in the testator's lifetime (*p*), or by such gifts as a sum of money presented by a father to his daughter for her wedding outfit and the honeymoon (*q*). The presumption of satisfaction is only one of law, and may be rebutted; as where the two provisions by the different instruments are of a different nature (*r*); but merely slight differences between the limitations of the will and the settlement, as, for instance, different powers of investment, different trustees, and variation in the power of appointment, will not, if the two provisions are substantially of the same nature, negative the rule against double portions (*s*). The question to be decided is what the testator is dealing with in his will (*t*), and the testator's intention is not to be gathered from a sealed letter handed by him to the legatee saying that a gift was in substitution for the legacy. The letter was not to be and was not opened until after the death

(*n*) See *Re Lacon, Lacon* v. *Lacon (ubi sup.)*.

(*o*) Per Cranworth, L.C., in *Lord Chichester* v. *Coventry*, L. R. 2 H. L. 71. For a full discussion of this subject see *Ex parte Pye*, 18 Ves. 140; 2 W. & T. L. C. 366.

(*p*) *Re Peacock's Estate*, L. R. 14 Eq. 236; S. C. 24 L. T. 472.

(*q*) *Ravenscroft* v. *Jones*, 33 L. J. Ch. 482.

(*r*) See *Lord Chichester* v. *Coventry (ubi sup.)*; and see *Cartwright* v. *Cartwright*, [1903] 2 Ch. 306; 72 L. J. Ch. 622.

(*s*) See *Mayd* v. *Field*, 3 Ch. D. 587; 45 L. J. Ch. 699.

(*t*) *Re Slater, Slater* v. *Slater*, [1906] 2 Ch. 480; 75 L. J. Ch. 660; *Re Jameson, King* v. *Winn*, [1908] 2 Ch. 111; 77 L. J. Ch. 729.

and therefore not having been communicated to the legatee until after the death, the letter was not admissible in evidence, and it was held that there was nothing affecting the conscience of the legatee and precluding her from claiming both the gift and the legacy (*u*). There must be strong evidence on the second instrument that the child was intended to get a double portion (*x*). This is really a question of the intention of the donor as to whether the child benefited is to be put to his election or not (*y*). In case the satisfaction of the portion previously secured is by will, slighter circumstances are adequate to repel the presumption than in the case in which the gift by way of settlement follows the will (*z*). This rule does not extend to a gift made to a child before the date of the will, for there is no presumption of law that the payment of a sum of money to a child by a parent before the date of the will is to go against a legacy to that child (*a*).

It is now settled (though formerly controverted) that when the adeeming or satisfying amount is less than the original sum (whether covenanted to be paid, or left as a legacy), such smaller sum is only a *pro tanto* and not total ademption or satisfaction (*b*).

Parent Indebted to Child.—Where a parent owes a debt to a child, a subsequent legacy will not, in the absence of intention, express or implied, be considered a satisfaction of the debt unless it be either equal to or greater than the debt in amount; and the presumption of satisfaction will not be repelled by any of those slight circumstances which will take a bequest of such amount to a stranger out of the general rule (*c*). Where a parent is indebted to a child, and makes in his lifetime an advancement to the child, as upon marriage or some other occasion, of a portion equal to or exceeding the debt, it will *prima facie* be considered a satisfaction, and it is immaterial whether the portion be given in consideration of natural love or affection, or whether property be settled by the other party in consideration of it, or whether, in the case of a father to a daughter, the husband be ignorant

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(*u*) *Re Shields, Corbould-Ellis* v. *Dales*, [1912] 1 Ch. 591; 81 L. J. Ch. 370.
(*x*) Per Turner, L.J., in *Lord Chichester* v. *Coventry* (*ubi sup.*).
(*y*) *Re Battersby's Estate*, 19 L. R. Ir. 359.
(*z*) *Lord Chichester* v. *Coventry* (*ubi sup.*); *Tussaud* v. *Tussaud*, 9 Ch. D. 363; 47 L. J. Ch. 849.
(*a*) See *Taylor* v. *Cartwright*, L. R. 11 Eq. 167.
(*b*) *Pym* v. *Lockyer*, 5 Myl. & Cr. 29; *Lady Thynne* v. *Earl of Glengall*, 2 H. L. Cas. 131; *Re Pollock, Pollock* v. *Worrall*, 28 Ch. D. 552; 54 L. J. Ch. 489.
(*c*) *Tolson* v. *Collins*, 4 Ves. 483. The rule is *Debitor non presumitur donare.*

of the debt (*d*). But this presumption may be rebutted, as where a parent by a breach of trust becomes indebted to a child in respect of the trust funds and on the marriage of the child settles an equal or larger amount than the debt and the child is ignorant that a breach of trust had been committed (*e*).

Persons in loco parentis.—This rule against double portions extends to the case of persons not actually parents, but who stand *in loco parentis*; as a grandfather (*f*), or a collateral relation (*g*) such as a rich bachelor taking his brother's children into his home and providing for them (*h*); and where such a person gives a legacy for a particular purpose, and afterwards advances money for the same purpose, a presumption arises that it was intended, and it will accordingly be held as an ademption of it (*i*); but a mere general legacy does not disclose any such particular purpose (*k*). The presumption applies where purchases are made by the father in the name of the child, but it does not apply in the case of a purchase by the mother (*l*). Where the person does not stand in such a relation, or the facts do not disclose any intention of satisfaction, the presumption will not arise (*m*). This doctrine of ademption of legacies founded on parental or *quasi*-parental relations, applies also to cases where a moral obligation other than parental or *quasi*-parental is recognized in the will, though without reference to any special application of the money (*n*).

Advances brought into Hotchpot.—Where a parent has made advances to a child "by way of portion," and dies intestate, the child so advanced is not entitled to a share under the Statutes of Distributions (*o*) in the residue of the intestate's property unless it brings into hotchpot the sum or sums so advanced to it in order to equalize the share taken by each child of the deceased intestate parent (*p*). An advancement by way of

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(*d*) *Wood* v. *Briant*, 2 Atk. 521; *Plunkett* v. *Lewis*, 3 Ha. 316.
(*e*) *Crichton* v. *Crichton*, [1896] 1 Ch. 870; 65 L. J. Ch. 491.
(*f*) *Roome* v. *Roome*, 3 Atk. 181.
(*g*) *Re Dawson, Swainson* v. *Dawson*, [1919] 1 Ch. 102; 88 L. J. Ch. 73.
(*h*) *Powys* v. *Mansfield*, 3 My. & Cr. 359; 7 L. J. Ch. 9; and see *Fowkes* v. *Pascoe*, 10 Ch. App. 343; 44 L. J. Ch. 367.
(*i*) *Monck* v. *Monck*, 1 B. & B. 303; *Fowkes* v. *Pascoe*, L. R. 10 Ch. App. 343; 44 L. J. Ch. 367.
(*k*) *Re Smythies, Weyman* v. *Smythies*, [1903] 1 Ch. 259; 72 L. J. Ch. 216.
(*l*) *Bennet* v. *Bennet*, 10 Ch. 474.
(*m*) *Pankhurst* v. *Howell*, L. R. 6 Ch. App. 136; *Re Smythies, Weyman* v *Smythies* (*ubi sup.*).
(*n*) *Re Pollock, Pollock* v. *Worrall* (*ubi sup.*).
(*o*) 22 & 23 Car. II. c. 10; 1 Jac. II. c. 17, s. 7.
(*p*) 22 & 23 Car. II. c. 10, s. 5.

portion has been defined by Jessel, M.R., in *Taylor* v. *Taylor* (*q*) to be "something given by the parent to establish the child in life, or to make what is called a provision for him," but this opinion was disapproved of by Pearson, J., in *Re Blockley, Blockley* v. *Blockley* (*r*); and in *Boyd* v. *Boyd* (*s*) Wood, V.-C., said: "Whenever a sum is paid for a particular purpose, which is thought good and right by the father, and which the son himself desires, if it be money which is drawn out in considerable amount, and not a small sum, it must be treated as an advance. The payment of the money is the important thing; the Court does not look to the application." But the view of Jessel, M.R., in *Taylor* v. *Taylor* (*t*), has been preferred by the Court of Appeal (*u*). The legal presumption that a gift in the lifetime of a testator was intended as a portion may be rebutted by the circumstances of the gift (*x*). And where the gift is of the nature of remuneration for the child's services, then the child is not bound to account for, or bring into hotchpot, such advance (*y*). If a child has to account on the footing of satisfaction persons claiming under him are in the same position (*z*). Sums given for the following objects have been held advancements: Payment of admission to one of the Inns of Court in case of a son intended for the Bar (*a*); purchase of a commission (in the days of army purchase) (*b*), and an outfit of a son entering the army (*c*); the price of plant and machinery and other payments for starting a child in business (*d*); purchase money of a business bought by the testator for a child (*e*); provision for a son on marriage, including the limitations for his wife and children (*f*), and if such son die in the parent's lifetime his issue cannot claim his distributive share without bringing his advancement into hotchpot (*g*); a gift to a child to pay a debt (*h*). The following have been held not to be advances:

(*q*) L. R. 20 Eq. 157; 44 L. J. Ch. 718.
(*r*) 29 Ch. D. 250; 54 L. J. Ch. 722.
(*s*) L. R. 4 Eq. 305. (*t*) *Ubi sup.*
(*u*) *Re Scott, Langton* v. *Scott*, [1903] 1 Ch. 1; 72 L. J. Ch. 20.
(*x*) *Ibid.*
(*y*) *Re Lacon, Lacon* v. *Lacon*, [1891] 2 Ch. 482; 60 L. J. Ch. 403.
(*z*) *Re Scott, Langton* v. *Scott* (*ubi sup.*).
(*a*) *Taylor* v. *Taylor* (*ubi sup.*).
(*b*) *Ibid.* See *Rowles* v. *Rowles*, 7 Jur. 665.
(*c*) *Ibid.*
(*d*) *Ibid.*
(*e*) *Auster* v. *Powell*, 1 De G. J. & Sm. 99.
(*f*) *Weyland* v. *Weyland*, 2 Atk. 635.
(*g*) *Proud* v. *Turner*, 2 P. Wms. 560.
(*h*) *Re Blockley, Blockley* v. *Blockley*, 29 Ch. D. 250; 54 L. J. Ch. 722. *Re Whitehouse, Whitehouse* v. *Edwards*, 37 Ch. D. 683; 57 L. J. Ch. 161.

Mere casual payments made at odd times without the definite purpose of establishing the child in life, even though necessary to maintain him in the position acquired by a previous advancement (*i*); or annuities paid by a father to his daughter pursuant to his covenant in a separation deed (*k*); these are rather allowances in the nature of maintenance. A liability by a parent as surety for a child which is afterwards enforced against the executors of the parent is not an advancement (*l*); so, too, the payment by a father of a son's debts may not be deemed to be an advancement requiring the sum to be brought into account (*m*). Money paid by the testator under a guarantee is an advance, but not money which the testator was never entitled to receive during his life (*n*), nor money advanced before the date of the will, nor small sums whether before or after that date (*o*).

The like necessity of bringing advancements into hotchpot arises where the parent leaves a will with a hotchpot clause; and the effect of that clause is to prevent the child advanced (without bringing into hotchpot the sum advanced to him) from taking any further part of the disposable fund, and to give to the other objects of the will that portion of the fund which, but for the hotchpot clause, he would have taken (*p*). Where a testator by a codicil directed that all sums of money appearing in his books of account to have been advanced by him to his son, exclusive of an annual allowance, should be brought into hotchpot it was held that only advances appearing in his books prior to the date of the codicil could be taken into account (*q*). Interest will be chargeable on the advances, if necessary, to equalize the shares of the advanced and unadvanced children (*r*); but in the absence of any direction by a testator to the contrary, advancements to children on account of their portions bear no interest up to his death; but from his death they bear interest at the rate of 4 per cent. (*s*). In the case of a partial intestacy,

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(*i*) *Boyd* v. *Boyd*, L. R. 4 Eq. 305; *Taylor* v. *Taylor* (*ubi sup.*). See *Pusey* v. *Desbouverie*, 3 P. Wms. 317, note o; *Watson* v. *Watson*, 33 Beav. 574.

(*k*) *Hatfield* v. *Minet*, 8 Ch. D. 136; 47 L. J. Ch. 612.

(*l*) *Re Whitehouse*, *Whitehouse* v. *Edwards* (*ubi sup.*).

(*m*) *Re Scott*, *Langton* v. *Scott* (*ubi sup.*).

(*n*) *Auster* v. *Powell* (*ubi sup.*).

(*o*) *Re Peacock's Estate*, L. R. 14 Eq. 236; *Re Orme*, *Evans* v. *Maxwell*, 50 L. T. 51.

(*p*) See *Warde* v *Firmin*, 11 Sim. 235.

(*q*) *Re Deprez*, *Henriques* v. *Deprez*, [1917] 1 Ch. 29; 86 L. J. Ch. 91.

(*r*) *Re Rees*, *Rees* v. *George*, 17 Ch. D. 701; but see *Re Dallmeyer*, *Dallmeyer* v. *Dallmeyer*, [1896] 1 Ch. 372; 65 L. J. Ch. 201.

(*s*) *Stewart* v. *Stewart*, 15 Ch. D. 539; 49 L. J. Ch. 763.

advances must be brought into hotchpot (*t*). The combined effect of a gift clause and a hotchpot clause in a will is primarily to pass the amount of the gift absolutely to the donee, and to take it out of the testator's estate (*u*). The heir-at-law is not bound to bring into hotchpot any land which he takes by descent or otherwise from the intestate (*x*).

Transfer into Name of Child.—Sums transferred by a parent into the name of a child will, in the absence of rebutting evidence, be presumed to be advancements, and not to create a resulting trust for the transferor (*y*), and though the father may be in receipt of the rents or income of property purchased in the name of the son this does not rebut the presumption. If it is proved in evidence that no benefit was intended, then the presumption is rebutted, and there will be a resulting trust for the parent (*z*), and where the parent continues in possession of the fund, the intended benefit must be a present one, and not a purchase with a view to an ultimate benefit (*a*); and where a present benefit is intended, it is of course inconsistent with the reservation of any beneficial interest (*b*). When a transfer is made to a child, the burden is thrown upon those who deny that it was an absolute gift to prove there was no intention on the part of the parent to make an advancement or provision for the child (*c*). "Where a father purchases property in the name of his son, without making any formal declaration of trust, it is either a gift to the son absolutely or he is a trustee for his father. If the son is a trustee at all, he is wholly a trustee; but the strong presumption of law is that he is not a trustee. It is said that the taking possession by the father at the time of the purchase is insufficient in general to rebut the presumption, but this does not, I conceive, apply where there is a formal and unmistakable act of taking possession. Suppose a man bought a shop, and put his own name over the door, that would be an ostensible taking possession, sufficient to show ownership

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(*t*) Under the combined effect of 22 & 23 Car. II. c. 10, s. 5, and 11 Geo. IV. and 1 Wm. IV. c. 40, s. 1; *Stewart* v. *Stewart* (*ubi sup.*).

(*u*) *Re Cosier, Humphreys* v. *Gadsden*, [1897] 1 Ch. 325; 66 L. J. Ch. 236.

(*x*) See *Lutwyche* v. *Lutwyche*, Cas. temp. Talb. 276.

(*y*) *Grey* v. *Grey*, 1 Ch. Cas. 296; followed in *Stamp Duties Commissioners* v. *Byrnes*, [1911] A. C. 386; 80 L. J. P. C. 114; *Dyer* v. *Dyer*, 2 Cox, Eq. Cas. 92; *Sayre* v. *Hughes*, L. R. 5 Eq. 376; 37 L. J. Ch. 401; *Fowkes* v. *Pascoe*, L. R. 10 Ch. App. 343; 44 L. J. Ch. 367.

(*z*) *Dumper* v. *Dumper*, 3 Giff. 503.

(*a*) *Forrest* v. *Forrest*, 13 W. R. 380.

(*b*) *Ibid.*

(*c*) *Hepworth* v. *Hepworth*, L. R. 11 Eq. 10; 40 L. J. Ch. 111.

in the father and trusteeship in the son" (*d*). But where a parent advances money for the purpose of qualifying the child for a particular position, and with no intention of making an absolute gift of the money so advanced, there is no presumption of advancement, but the child will hold, if necessary, the qualifying property as trustee (*e*). This presumption holds good in the case of the purchase of real estate (*f*).

Presumption Extends to Persons in loco parentis.—This presumption is not limited to the case of father and child, but arises in the case of those who put themselves *in loco parentis* to the child advanced, as grandfather and grandchild (*g*), mother and child (*h*), uncle or aunt and nephew and niece (*i*), and parents and their bastard children (*k*). Where a mother makes a purchase or investment in the name of her child, or jointly in the names of herself and her child, that fact of itself does not afford the presumption of advancement, for there is no such obligation on her part to provide for her child as on the part of the father (*l*). In these cases the intention to advance is a question of evidence (*m*). It is not necessary that the person advanced should assent to the gift (*n*).

Fraud on Powers by Parents.—Parents that are donees of powers of appointment under settlements must exercise them straightforwardly and honestly. Where a codicil unfavourable to the donee of a power was revoked on his promise not to defeat the interests of a particular person such an exercise of the power was held void (*o*). Also where a power was exercised giving a child of a prior marriage a preference in order to induce the wife to have a decree *nisi* for divorce made absolute it was held to be a fraud on the power (*p*). A power to appoint among children is a power in the nature of a trust created and intended to be exercised with a view to the benefit of the objects of the

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(*d*) Per Wickens, V.-C., in *Stock* v. *M'Avoy*, L. R. 15 Eq. 55, 58; 42 L. J. Ch. 230.
(*e*) *Re Gooch*, *Gooch* v. *Gooch*, 62 L. T. 384.
(*f*) *Dyer* v. *Dyer*, 2 Cox, Eq. Cas. 92.
(*g*) *Ebrand* v. *Dancer*, 2 Ch. Cas. 26; but see *Tucker* v. *Burrow*, 11 Jur. (N.S.) 525.
(*h*) *Sayre* v. *Hughes*, L. R. 5 Eq. 376; 37 L. J. Ch. 401; *Batstone* v. *Salter*, L. R. 10 Ch. App. 431; *Re Orme*, *Evans* v. *Maxwell*, 50 L. T. 51.
(*i*) *Currant* v. *Jago*, 8 Jur. 610.
(*k*) *Beckford* v. *Beckford*, Lofft, 490.
(*l*) *Bennet* v. *Bennet*, 10 Ch. D. 474.
(*m*) *Ibid.*
(*n*) See *Standing* v. *Bowring*, 31 Ch. D. 282; 55 L. J. Ch. 218.
(*o*) *Tharp* v. *Tharp*, [1916] 1 Ch. 142; 85 L. J. Ch. 162.
(*p*) *Cochrane* v. *Cochrane*, [1922] 2 Ch. 230; 91 L. J. Ch. 605.

power as a class and as individuals (*q*). Where a power was exercisable among nephews and nieces and other relations of the donee it was held that the power was not a power of distribution but only of selection, and must be confined to persons falling within the Statute of Distributions, but that a grand-nephew came within the class (*r*). The class of relations taking would be more limited now under the Administration of Estates Act, 1925 (*s*), than under the repealed Statute of Distributions, in that cousins are not included. Where the power is not honestly exercised, the person improperly appointing is said to commit a fraud on the power (*t*). A fraud is committed on the power when exercised by the appointor with an absence of good faith and sincerity, and with an ulterior and sinister motive for the exercise (*u*). Thus a power was held to have been fraudulently executed in the following instance, in which the father appointing deliberately intended a benefit to result to himself: By a power in a settlement a father could raise a portion for a younger child at such time as he should direct; he directed it to be raised when the child was fourteen, who shortly afterwards died; the father, as her administrator, afterwards filed a bill to have the portion raised for his own benefit, but the bill was dismissed (*x*). This decision was based upon the ground that the appointment by the father, under the circumstances, was a fraud upon the power.

How Power Exercised.—The defective execution of a power will be aided in equity, as, for instance, where a power ought

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(*q*) Per Kindersley, V.-C., in *Coffin* v. *Cooper*, 2 Dr. & Sm. 373.
(*r*) *Sheehy* v. *Nugent*, [1915] 1 Ir. R. 42.
(*s*) 15 Geo. V. c. 23.
(*t*) Farwell, Pow. pp. 404 *et seq.*
(*u*) See *Duke of Portland* v. *Topham*, 11 H. L. C. 32.
(*x*) *Lord Hinchinbroke* v. *Seymour*, 1 B. C. C. 395. This case, as reported by Brown must be taken to be inaccurately reported: the facts are thus stated by Jessel, M.R., in *Henty* v. *Wrey* (21 Ch. D. 332, 341). Lord Hinchinbroke married the daughter of the Earl of Halifax; on the marriage the Earl settled the Halifax estate on himself for life, then to Lord Hinchinbroke, his son-in-law, for life; and then it would have gone to the first and other sons of the marriage (if any), and in default it went over to a nephew or cousin of Lord Hinchinbroke, the infant defendant Montagu. Then there was the clause shortly stated in Brown's report, providing the £10,000 for the portioning of younger children; but an important limitation is omitted in the report, namely, that in default of appointment the £10,000 would have gone to the daughter on her attaining the age of twenty-one or marrying, with a provision for her maintenance in the meantime. At the time of the appointment the daughter was in a consumption, and died the following year; the father was aware of her state. The facts, as above stated, show that a gross fraud on the power was contemplated, and the bill was dismissed on that ground. See remarks of Lord Eldon in *M'Queen* v. *Farquhar*, 11 Ves. 467, 479, and *Case of the Queensberry Leases*, 1 Bli. 339, 397, and of Sir Edward Sugden in *Keily* v. *Keily*, 2 Dr. & War. 38, 55. But see *Wellesley* v. *Lord Mornington*, 2 K. & J. 143.

to be executed by deed but is executed by will (*y*), but the directions as to the manner of exercise should be followed. Where the power is to be executed by will, the donor retains control notwithstanding his bankruptcy, as no one else can make his will for him, and, where the power is to be executed by will, an absolute conveyance of the estate by deed is invalid. The intention of the donor is that entire control, which is secured by the revocability of a will and defeated by any other instrument, should be reserved until the death of the donee (*z*). "The law is that the donee of a power exercisable only by will cannot by deed appoint or do any act equivalent to appointing the fund or any part of it. He cannot affirmatively by deed affect the fund in any way. But he can by deed negatively tie his own hands as to the manner in which he shall thereafter exercise his testamentary power. He can release his power or covenant that he will never exercise it (which will be equivalent to a release), or can covenant that he will not exercise it, so that a defined distribution of the fund or some part of it shall not result. Thus he may covenant that a particular beneficiary shall not have less than a certain share" (*a*).

Time for Charging Portions.—There is no rule of law that a charge on behalf of children cannot be raised till the children actually live to want it (*b*). So, where a father had a power of charging portions for younger children on real estate under a settlement, which gave him in the clearest terms power to fix the ages and times at which the portions should vest, and contained no provision for raising portions in default of appointment, and accordingly he appointed a sum in favour of his three younger children, their shares to vest immediately on the execution of the deed, and two of the children died a few years after, minors, their father, who survived them, taking their shares, it was held that the amount of their shares was raisable in favour of a person to whom he had assigned it by way of mortgage or security; that where a donee of such a power has clear authority to fix the times at which portions shall vest, and appoints a portion to vest immediately, there is no rule of law which prohibits its being raised in the event of the child dying under twenty-one and unmarried; that the appoint-

(*y*) *Smith* v. *Ashton*, 1 Freem. 308.
(*z*) *Reid* v. *Shergold*, 10 Ves. 380.
(*a*) Per Buckley, L.J., in *Re Evered, Molineux* v. *Evered*, [1910] 2 Ch. 161; 79 L. J. Ch. 465.
(*b*) *Henty* v. *Wrey*, 21 Ch. D. 332.

ment, so far as it made the portions vest immediately, was not a fraud on the power, as being made with a view to secure a benefit to the appointor; for that having regard to the fact that if the father had died without making any appointment, the children would have been unprovided for, it was manifestly for the benefit of the children that the father should make an appointment; and that as there was nothing to lead to the conclusion that when the appointments were made the children were likely to die young, and as in the event of the early death of the appointor the children might have derived a benefit from the absolute vesting of their portions, there was no ground for attributing to him an intention to benefit himself by making the portions vest immediately (*c*). The same principles seem applicable where a parent is authorized to appoint interest; and where a parent so authorized appoints interest in favour of infant children to be made payable to himself as their guardian, such appointment is not invalidated by the mere fact that he has means to support them, if, on the whole, the appointment is advantageous to the children (*d*).

Powers to appoint portions charged on land ought, if their language is doubtful, to be construed so as not to authorize appointments vesting those portions in the appointees before they want them, that is, before the attain twenty-one, or (if daughters) marry; where the language of the power is clear and unambiguous, effect must be given to it. Where upon the true construction of the power and the appointment the portion has not vested in the lifetime of the appointee, the portion is not raisable but sinks into the inheritance. Where upon the true construction of both instruments the portion has vested in the appointee the portion is raisable even although the appointee dies under twenty-one or (if a daughter) unmarried. Appointments vesting portions charged on land in children of tender years who die soon afterwards are looked at with suspicion; and very little additional evidence of improper motive or object will induce the Court to set aside the appointment or treat it as invalid, but without some additional evidence the Court cannot do so (*e*).

Bargains between Parent and Child.—A parent cannot bargain with his children on executing a power of appointment

(*c*) *Henty* v. *Wrey*, 21 Ch. D. 332. See *Re De Hoghton*, *De Hoghton* v. *De Hoghton*, [1896] 2 Ch. 385; 65 L. J. Ch. 528.

(*d*) *Re De Hoghton*, *De Hoghton* v. *De Hoghton* (*ubi sup.*).

(*e*) Per Lindley, L.J., in *Henty* v. *Wrey*, 21 Ch. D. 359.

in their favour for the purchase of other expectant shares belonging to them (*f*); nor can he stipulate for any advantage for himself or on behalf of a stranger. It is the fact of bargaining that renders the appointment consequential upon the bargain invalid and of no effect. But the mere fact that the donee of the power derives some benefit from the exercise of the power does not necessarily render the appointment invalid (*g*).

Release of Power.—A person to whom any power, whether coupled with an interest or not, is given, may release the power under the Conveyancing Act, 1881 (*h*), now reproduced in section 155 of the Law of Property Act, 1925 (*i*); and the fact that a release of a limited power of appointment will result in a benefit to the donee of the power is not sufficient to make the release fraudulent and void (*k*). A father who possesses a power over a fund in favour of his children with a life interest in it may, if he becomes entitled in right of a deceased child, call upon the trustees of the fund to transfer that portion of it to which he has become entitled on his releasing his power of appointment and surrendering his life interest in such portion (*l*). The surrender of the life interest in such a case renders the fund of which the father claims the transfer liable to the debts of the deceased child, and the father takes the fund subject to the payment of any debts as personal representative of his child (*m*). The same principle as to taking subject to debts will still apply to the persons taking under the Administration of Estates Act, 1925 (*n*). A power coupled with a duty cannot be so released (*o*); but the doctrines applicable to the fraudulent exercise of a power do not apply to the release of a power not coupled with a duty (*p*).

Defective Execution of Powers.—It sometimes happens that the donee of a power fails to comply with all the directions for the execution of the power, whereby it becomes defective; and

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(*f*) Farwell, Pow. 407, citing *Cunynghame* v. *Anstruther*, L. R. 2 Sc. & D. App. 223.

(*g*) *Re Huish's Charity*, L. R. 10 Eq. 5; 39 L. J. Ch. 499; *Cooper* v. *Cooper*, L. R. 7 H. L. Cas. 53; 39 L. J. Ch. 240.

(*h*) 44 & 45 Vict c. 41, s. 52. See *Smith* v. *Houblon*, 26 Beav. 482; and see *Re Somes, Smith* v. *Somes*, [1896] 1 Ch. 250; 65 L. J. Ch. 262.

(*i*) 15 Geo. V. c. 20.

(*k*) *Re Somes, Smith* v. *Somes* (*ubi sup.*); *Re Jones' Settlement, Stunt* v. *Jones*, [1915] 1 Ch. 373; 84 L. J. Ch. 406.

(*l*) *Smith* v. *Houblon* (*ubi sup.*); *Re Radcliffe, Radcliffe* v. *Bewes*, [1892] 1 Ch. 227; 61 L. J. Ch. 186.

(*m*) *Re Radcliffe, Radcliffe* v. *Bewes* (*ubi sup.*).

(*n*) 15 Geo. V. c. 23.

(*o*) *Re Eyre, Eyre* v. *Eyre*, 49 L. T. 259; *Saul* v. *Pattinson*, 34 W. R. 561.

(*p*) *Re Somes, Smith* v. *Somes* (*ubi sup.*).

in cases where the defects are not of the essence of the power, equity will interpose and remedy the defect and carry out the intention of the donee for the benefit of those intended to take an interest under it. The rule has been stated to be that "whenever a man having power over an estate, whether ownership or not, in discharge of a moral or natural obligation, shows an intention to execute such power, the Court will operate upon the conscience of the heir (or of the persons entitled in default), to make him perfect this intention" (*q*). Thus, where there is a defective execution of a power for the provision of a wife or a child, the Court will supply the defect (*r*); but not for the provision of a grandchild (*s*). Where parents under a marriage settlement are the joint donees of a power of appointment among the children of the marriage, and one of the parents becomes a lunatic, the Judge in Lunacy has no power under section 128 of the Lunacy Act, 1890 (*t*), to authorize the committee of the alleged lunatic to concur on his or her behalf in exercising the joint power (*u*).

Section 3.

Transactions in Fraud of Parental Rights.

Unconscionable Bargains.—Parental rights are said to be defrauded when heirs or expectant heirs have made such extravagant bargains induced by fraud or pressure of desperate circumstances, that their parents or those *in loco parentis* to them are misled and seduced to leave their estates, not to their heirs or families, but to a set of artful persons who have divided the spoil beforehand (*x*). Equity has alway relieved against catching and unconscionable bargains whereby those, who from their inexperience or indiscretion are unable fully to protect themselves, are the victims of the fraud or duress of others who have availed themselves of the opportunity to enrich themselves at the expense of the improvident. The true view of these transactions is to regard them less as frauds on the parental

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(*q*) Per Lord Alvanley in *Chapman* v. *Gibson*, 3 Bro. C. C. 228.

(*r*) *Tollet* v. *Tollet*, 2 P. Wms. 489. For a full discussion of this subject see Farwell Pow. pp. 335 *et seq.*

(*s*) See *Rodgers* v. *Marshall*, 17 Ves. 294.

(*t*) 53 & 54 Vict. c. 5.

(*u*) *Re A.*, [1904] 2 Ch. 328; 73 L. J. Ch. 648.

(*x*) See *Earl of Chesterfield* v. *Janssen*, 2 Ves. Sen. 125, 157. See *Woodhouse* v. *Shepley*, 2 Atk. 535; *Twistleton* v. *Griffith*, 1 P. Wms. 310; *Cole* v. *Gibbons*, 3 P. Wms. 393.

rights than matters against which equity ought to relieve on the ground of the personal equity of the heir or expectant heir (*y*).

This view has not prevailed uninterruptedly, for it has been laid down "that the extraordinary protection given in the general case must be withdrawn, if it shall appear that the transaction was known to the father or other person standing *in loco parentis*—the person, for example, from whom the *spes successionis* was entertained, or after whom the reversionary interest was to become vested in possession—even although such parent or other person took no active part in the negotiation, provided the transaction was not opposed by him, and so carried through in spite of him. Secondly, that if the heir flies off from the transaction, and becomes opposed to him with whom he has been dealing, and repudiates the whole bargain, he must not, in any respect, act upon it so as to alter the situation of the other party or his property; at least, if he does so, the proof lies upon him of showing that he did so under the continuing pressure of the same distress which gave rise to the original dealing. Still more fatal to his claim of relief will it be if the father or person *in loco parentis* shall be found to have concurred in this adoption of the repudiated contract" (*z*). The accuracy of these remarks has been disputed by Lord St. Leonards (*a*), who said: "Now the first of these rules is supported by no previous authority, and as a general rule cannot, it is submitted, be maintained. The knowledge of the parent *may*, under some circumstances, remove one of the objections to such a transaction, but the others might still remain. The son is entitled to be relieved, though the father may witness his ruin with indifference. It is the son's equity, though partly grounded upon public policy. In many cases the person standing *in loco parentis*, or from whom the *spes successionis* is entertained, or after whom the reversionary property is to become vested in possession, may be more than indifferent about the worldly prospects of the expectant heir."

This first rule has also been commented upon by Page Wood, V.-C., in *Talbot* v. *Staniforth* (*b*), who in the course of his judgment remarked: "Lord Brougham's doctrine . . . at the most,

(*y*) See the more modern case of *Heap* v. *Marris*, 2 Q. B. D. 630; 46 L. J. Q. B. 761. The point in this case was one only of pleading, but the defence involved the equitable right stated in the case.

(*z*) Per Brougham, L.C., in *King* v. *Hamlet*, 2 M. & K. 456, 473.

(*a*) Law of Property, 69. At the time of writing this work he was Sir E. Sugden.

(*b*) J. & H. 484, 502.

I think, cannot go beyond this, that if a father, being unable himself to supply his son's necessities, assists and protects him in raising money from strangers—the son in such case having the best security for obtaining the fair market value of what he sells—the Court may, perhaps, assume that a bargain made under such circumstances was fair and for full value. The only meaning I can attribute to Lord Brougham's words, consistently with the established doctrine, is that a person who deals with the assistance of the best advice and protection may be supposed to get a fair market price. To the doctrine so laid down I see nothing to object, assuming that the protection is full and ample, for the purpose of preventing any advantage being taken of the heir." The true and proper nature of these transactions has been recognized and described by Lord Selborne in the important case of the *Earl of Aylesford* v. *Morris* (*c*), in which he said: "In the cases of catching bargains with expectant heirs, one peculiar feature has been almost universally present; indeed, its presence was considered by Lord Brougham to be an indispensable condition of equitable relief, though Lord St. Leonards, with good reason, dissents from that opinion. Its victim comes to the snare (for this system of dealing does set snares, not perhaps for one prodigal more than another, but for prodigals generally as a class) excluded, and known to be excluded, by the very motives and circumstances which attract him, from the help and advice of his natural guardians and protectors, and from that professional aid which would be accessible to him if he did not feel compelled to secrecy. He comes in the dark, and in fetters, without either the will or the power to take care of himself, and with nobody else to take care of him. Great judges have said that there is a principle of public policy in restraining this; that this system of undermining and blasting, as it were, in the bud the fortunes of families, is a public as well as a private mischief; that it is a sort of indirect fraud upon the heads of families from whom these transactions are concealed, and who may be thereby induced to dispose of their means for the profit and advantage of strangers and usurers, when they suppose themselves to be fulfilling the moral obligation of providing for their own descendants. Whatever weight there may be in any such collateral considerations, they could hardly prevail if they did not connect

(*c*) L. R. 8 Ch. App. 484, 491; 42 L. J. Ch. 546.

themselves with an equity more strictly and directly personal to the plaintiff in each particular case. But the real truth is that the ordinary effect of all the circumstances by which these considerations are introduced is to deliver over the prodigal helpless into the hands of those interested in taking advantage of his weakness; and we so arrive in every case at the substance of the conditions which throw the burden of justifying the righteousness of the bargain upon the party who claims the benefit of it." These observations put the matter on the true basis.

Where there is a sale of his reversionary interest by a young man soon after reaching majority great care must be exercised in the bargain; and though mere undervalue in the bargain is not conclusive proof of fraud or unconscionableness, it may entitle the expectant heir to relief in a Court of equity; and the onus of proving the transaction fair and the price sufficient is on the purchaser (*d*).

(*d*) See *O'Rorke* v. *Bolingbroke*, 2 App. Cas. 814.

CHAPTER IV.

RIGHTS AND OBLIGATIONS OF CHILDREN IN RESPECT OF THEIR PARENTS.

In this chapter will be briefly pointed out the rights and obligations of children in respect of their parents, both as regards their persons and property. The obligations of the parent towards the child of necessity involve the corresponding rights of the child, which it is entitled to have fulfilled. In the present chapter only the rights and *quasi*-rights of the child, which do not correspond with any obligations of the parent already discussed, will be treated of; thus, the right of a child to be supported and educated by its parents having been already discussed will not be further mentioned.

Maintenance of Parents.—The duty of children to support and maintain their parents is one that is based upon the sentiment that the care and trouble expended by parents in rearing and educating their children should be recompensed when their parents are old and feeble, and little capable of earning their daily bread, and the children are able to work. But, as in the case of the duty of the parent to support the child, this duty to support and maintain father or mother is only an imperfect obligation. If a child be rolling in wealth, and its parents be in needy circumstances, he cannot be compelled to contribute the smallest coin to alleviate their wants and distress. If, however, the parent become a pauper and chargeable to the rates of the parish, then under the provisions of the Poor Law (*a*), the child must, if he has the means, contribute to his support. But until an order is made by the justices under the statute of Elizabeth, there is only a moral and not a legal obligation on a son to support his poor and aged parent. It is the making of the order that transmutes the moral into the positive obligation (*b*). A child, if able,

(*a*) 43 Eliz. c. 2, s. 7. "The children of every poor, old, blind, and impotent person . . . being of sufficient ability, shall at their own charges relieve and maintain every such poor person," &c.

(*b*) *Reg.* v. *Ireland*, L. R. 3 Q. B. 130; 37 L. J. Q. B. 73; and see *Bancroft* v. *Mitchell*, L. R. 2 Q. B. 549; 36 L. J. Q. B. 257.

is liable for the support of its mother, though she has married again; and the liability to contribute towards such support is not affected by the provisions of 4 & 5 Wm. IV. c. 76, s. 56 (*c*).

The effect of this state of the law would seem to be that a child, though of sufficient ability, on whom an order of justices for the support of his parent had *not* been made, might allow that parent to starve to death, and yet be free from liability to any punishment. There is then a marked difference between the liability of a parent for the support and maintenance of a child, and that of a child for the support and maintenance of its parent; for if any person (including a parent) who has the custody, charge or care of any child wilfully neglects such child in a manner likely to cause such child injury to its health, he shall be guilty of a misdemeanour (*d*). Of course the child must be under sixteen years of age, or, if over that age, be from some physical or mental defect unable to provide for itself. If the child be injured in body or its health the parent in charge may be indicted for the offence of cruelty (*e*). If the child's death be accelerated by want of medical aid, though the parent may be actuated by religious and conscientious objection to calling medical assistance, the latter may be indicted and convicted of manslaughter (*f*). This liability is apart from any order made upon the parent for the support of the child; whereas until the order is made upon the child to contribute to its parent's support, he is under a mere moral obligation which cannot be enforced, and which, if not complied with, renders him amenable to no sanction of the law.

Emancipation.—Emancipation is not a right which can be enforced by the child, but is rather a privilege which is allowed by the parent. A child under age may be freed from the parental control by becoming what is termed emancipated. A child who, though a minor, leaves his father's family and household, and by reason of his trade, occupation, or condition is not under the power of control of the father, becomes forisfamiliated and emancipated, that is, *sui juris* and independent; thus, a son, nineteen years of age, who left his father's family and went to another place, where he remained, was held to be emancipated (*g*). Emancipation is based upon a condition

(*c*) *Arrowsmith* v. *Dickenson*, 20 Q. B. D. 252.
(*d*) 4 Edw. VII. c. 15, s. 1.
(*e*) *Ibid.*; and see *Rex* v. *Friend et uxor*, cited 1 Russ. Cr. 949.
(*f*) *Reg.* v. *Senior*, [1899] 1 Q. B. 283: 68 L. J. Q. B. 175.
(*g*) *St. Michael's, Norwich*, v. *St. Matthew's, Ipswich*, 2 Stra. 831.

of things which is inconsistent with the idea of the child being a part of the father's family and under his control (*h*); and it would seem that even in the case of a minor marriage would operate as an emancipation (*i*). Enlistment in the army is a relation inconsistent with the parental control, and operates as an emancipation of the child (*k*). But mere enlistment is insufficient to bring about emancipation if the son is discharged from the army, and comes back and lives with his father before he attains his majority (*l*). But service in the police force does not emancipate him, though living away from his father (*m*). Ordinary apprenticeship or domestic hiring of a minor child does not effect his emancipation (*n*). But where an adult child leaves the paternal household and enters the army, or ordinary service, as domestic servant or labourer, he is deemed to be emancipated (*o*). Emancipation in the Roman system was of far greater importance than in the English; in the former a large alteration was effected in the privileges and liabilities of the child; whereas in the latter it is chiefly used in testing whether the child has or has not acquired a separate settlement for poor-law purposes. Emancipation from parental control would not relieve a child from the necessity of contributing to the support of its parents, if occasion should demand it. The only effect of emancipation as between parent and child would seem to be that it gives to a minor child a right to his own wages or earnings.

Right of Inheritance.—A parent, as has been seen, can be compelled to support and maintain his child, if able to do so, but there is no duty upon him compelling him to leave by will any sum, however small, to his child (*p*). In this respect the English law differs from the Roman, which provided that descendants who had been disinherited by their ascendants might bring an action *de inofficioso testamento* (undutiful will),

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(*h*) See *Rex* v. *Whitton-cum-Twambrookes*, 3 T. R. 355; *Reg.* v. *Scammonden*, 15 L. J. M. C. 30.

(*i*) See *Rex* v. *Everton*, 1 East, 526.

(*k*) *Rex* v. *Walpole St. Peter's*, 1 W. Bl. 699; *Rex* v. *Stanwix*, 5 T. R. 670.

(*l*) *Rex* v. *Rotherfield Greys*, 1 B. & C. 345; and see *Rex* v. *Woburn*, 8 T. R. 479.

(*m*) *Reg* v. *Selborne*, 29 L. J. M. C. 56.

(*n*) *Rex* v. *Halifax*, Burr. 806; *Rex* v. *Tottington Lower End*, Cald. 284; *Rex* v. *Stretton*, Cald. 487.

(*o*) *Rex* v. *Roach*, 6 T. R. 247.

(*p*) The popular theory that a parent must leave something to his child is not based upon any legal fact; and a child need not be "cut off with a shilling" in order to render the will effectual.

for the purpose of setting it aside (*q*). The Scotch *legitim* (or *bairn's part of gear*) is one-third of the father's personal property where he leaves a widow, and one-half where he does not, which is divisible as of right among his children. In the case of parents dying intestate before January 1, 1926 (the date of commencement of the Administration of Estates Act, 1925 (*r*)), and leaving real property, the law gave it to the eldest son, and in default of a son or sons, to the daughter, or if more than one, to them equally as tenants in common.

If before that date the father died intestate as to his personal property, the law (*s*) divided the property equally among the children; if he did not leave a widow, they took the whole; if he left a widow they divided two-thirds of it among themselves. When grandchildren took under the statute they took *per stirpes* and not *per capita* (*t*).

The inheritance and succession of her children to their mother's real and personal property on intestacy were the same as in the case of the father, with the one qualification, that if the father survived he took absolutely her personal property to the exclusion of the children, notwithstanding the alteration effected by the Married Women's Property Act, 1882.

New Law of Inheritance.—The Administration of Estates Act, 1925 (*u*), repeals the Statute of Distribution (*x*), the Administration of Estates Acts, 1798, 1833, and 1869, the Intestates Estates Acts, 1884 and 1890, and as to estates of persons dying wholly or partially intestate after December 31, 1925, abolishes by section 45 all existing modes, rules and canons of descent and devolution of real estate or personal inheritance whether operating by the general law or by the custom of gavelkind or Borough English or any other custom. The right of the husband as tenant by the curtesy or otherwise, and the right of the wife to dower, freebench, or any other estate (except so far as the right has attached before January 1, 1926, and cannot be barred by a testamentary or other disposition made by the husband), are also abolished. In future there will be no

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(*q*) By Justinian's legislation, which followed the analogy of the *lex Falcidia*, it was a quarter of the amount the complainant would have obtained if the deceased had died without making a will (Dig. 5, 2, 8, 6; Hunter, Rom. Law, 602).

(*r*) 15 Geo. V. c. 23.

(*s*) 22 & 23 Car. II. c. 10 (Statute of Distributions).

(*t*) *Re Natt, Walker* v. *Gammage*, 37 Ch. D. 517; 57 L. J. Ch. 797.

(*u*) *Ubi sup.*

(*x*) 22 & 23 Car. II. c. 10.

distinction between the right of inheritance as to real estate or personalty, inasmuch as by section 33 it is provided that on the death of a person intestate as to any real or personal estate, such estate shall be held by his personal representative: (a) as to the real estate upon trust to sell the same, and (b) as to the personal estate upon trust to call in, sell and convert into money such part as shall not consist of money, and out of the proceeds to pay the debts, funeral and testamentary expenses, and to provide for any pecuniary legacies bequeathed by the will (if any) of the deceased, and the residue becomes the residuary estate of the deceased. Section 46 sets out the new law of succession to real and personal property on intestacy, by providing that the residuary estate shall be distributed or held on trust in the following manner: : If the intestate leave a surviving spouse with or without issue the surviving spouse takes the personal chattels absolutely. Personal chattels are defined as meaning carriages, horses, stable effects, motor cars and accessories (not used for business purposes), plate, pictures, furniture, jewellery, musical and scientific instruments, wines and other consumable stores, etc., but not chattels used for business purposes, or money or securities for money. In addition the residuary estate stands charged with the payment of a net sum of £1,000 free of death duties and costs to the surviving spouse with interest at 5 per cent. until payment, and subject to the provision of such sum the residuary estate, other than the personal chattels, is to be held upon trust, if the intestate leaves no issue, for the surviving spouse for life, and then for the parents of the intestate in equal shares absolutely, or if only one parent survives, to that one absolutely. Failing parents, then, subject to the life interest to the surviving spouse, for brothers and sisters of the whole blood of the intestate absolutely, next brothers and sisters of the half blood absolutely. Failing brothers and sisters, then in the order named to the grandparents, uncles and aunts of the whole blood, uncles and aunts of the half blood. Failing any such persons on trust for the surviving spouse absolutely.

If the intestate leaves issue and a surviving spouse one half is to be held on trust for the surviving spouse for life, and the other half on the statutory trusts for the issue; but in the event of the issue failing in the lifetime of the surviving parent this half also is to be held on trust for the surviving parent. In the event of there being no surviving spouse the residuary estate

is to be held on trust in equal shares, if more than one, for all or any the children or child of the intestate living at the death of the intestate, who attain twenty-one or marry under that age, and for all or any of the issue, living at the death of the intestate, who attain the age of twenty-one or marry under that age, of any child of the intestate who predeceases the intestate, such issue to take through all degrees, according to their stocks, in equal shares, if more than one, the share their parent would have taken.

Wills Act, 1837.—Children and other issue obtain an advantage in respect of the wills of their parents, for where a person devises or bequeaths property to a stranger, who dies in his lifetime, such devise or bequest lapses; but under the Wills Act, 1837 (*y*), where a child or other issue to whom any real or personal estate shall be devised or bequeathed for an interest not determinable at his death shall die in the lifetime of the testator, leaving issue who shall be living at the testator's death, such gift shall not lapse. This provision, however, does not apply to an appointment under a special power (*z*), or to a testamentary gift to children as a class (*a*).

Suit by Infant against Parent.—The right of a child to bring an action against its parent in respect of the latter's dealings with its property is unquestioned. But at this point the question may be asked whether an infant child can sue its parent for a tort, such as personal violence done against it, and whether an adult child can sue its parent for a tort committed during infancy (*b*). There is no rule of the common law to prevent such actions being brought, because the relation of parent and child is not of so intimate and close a nature as that existing between husband and wife. But there is no case in the books which actually shows that this action has ever been maintained on grounds such as the personal violence of the parent towards the child. The reason of this may well be that the dictates of family life, and the repugnance that society would evince towards a display of such feelings, have discouraged such actions; besides, the Courts of equity, if not always those

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(*y*) 1 Vict. c. 26, s. 33.

(*z*) *Griffiths* v. *Gale*, 12 Sim. 327; 13 L. J. Ch. 286; *Holyland* v. *Lewin*, 26 Ch. D. 266; 53 L. J. Ch. 530; in which case *Freme* v. *Clement*, 18 Ch. D. 499; 50 L. J. Ch. 801, was disapproved of.

(*a*) *Re Harvey's Estate, Harvey* v. *Gillow*, [1893] 1 Ch. 567; 62 L. J. Ch. 328.

(*b*) If the action was brought during infancy the infant would necessarily appear by a next friend.

of law, have interfered to remove the child from the custody of the parent when unfit to retain it. If recourse is not had to equity, it would be better, and in the interests of society, that the cruel and unnatural parent should be punished by the more speedy redress of a criminal Court for an act of criminal violence, than by a pecuniary fine inflicted after the more tedious process of a civil suit.

But where the tort is not mere personal violence, but some other wrong, such as libel or slander, there does not seem to be any reason why an infant child should not sue its parent and recover compensation. Where the child is of age and emancipated, and a tort of any kind or description is committed against him by the parent, an action would lie on his part to redress the injury, and such actions, though not frequently, are brought and maintained. The remarks of an American writer (*c*) on this point may be interesting: "The question, moreover, is sometimes raised in these days, whether a young son or daughter occupying the filial relation may not, on becoming of age, sue the parent or *quasi*-parent for alleged maltreatment or other injury. With reference to a blood parent, however, all such litigation seems abhorrent to the idea of family discipline which all nations, rude or civilized, have so steadily inculcated, and the privacy and mutual confidence which should obtain in the household. An unkind and cruel parent may and should be punished at the time of the offence, if an offender at all, forfeiting custody and suffering criminal penalties if need be; but for the minor child who continues, it may be for long years, at home and unemancipated, to bring a suit when arrived at majority, free from parental control and under counter influences, against his own parent, either for services accruing during infancy, or to recover damages for some stale injury, real or imagined, referable to that period, appears quite contrary to good policy. The Courts should discourage such litigation, and so upon corresponding grounds the parent's suit, as to causes of action referable to the period and relation of tender childhood."

(*c*) Sch. Dom. Rel. s. 275.

CHAPTER V.

RIGHTS AND LIABILITIES OF PARENTS IN RESPECT OF TORTS DONE TO OR BY THE CHILD.

SECTION 1.

Right of Parent to Maintain Action for Tort done to Child.

Loss of Services.—The right of the parent to maintain an action for a tort done to his child is based upon the relation or *quasi*-relation of master and servant. A child who is under age or adult may maintain an action for damages in respect of a tort or injury committed upon him (*a*); but under certain circumstances the parent may also claim indemnity for the injury, whether it be an assault and battery, injury by negligence, or seduction of child from home, or the like. A parent has a right of action for an injury done to his child by the wrongful act of another, if the child is old enough to be capable of rendering him some act of service, and can be treated in law as his servant (*b*); in other words, a parent as such has no remedy for an injury done to his child, and cannot recover for it, unless the latter can be treated in law as his servant. Thus, where an infant two and a half years old was injured by the defendant's carriage, his father was nonsuited in an action for damages in respect of the injury, on the ground that the loss of service being the gist of the action, and the child being incapable of rendering any service because of his tender age, the action could not be maintained (*c*). The parent must allege in his action that it is the tortious act of the defendant *per quod servitium amisit*, &c., but in a case of an assault or injury of this nature no evidence of service is necessary beyond that which the law will imply as between parent and child (*d*). The incidental expenses incurred in consequence of the injury

(*a*) *Jay* v. *Whitfield*, cited 3 B. & A. 308.
(*b*) Add. Torts, 531; *Hall* v. *Hollander*, 4 B. & C. 660; *Grinnell* v. *Wells*, 7 M. & G. 1033.
(*c*) *Hall* v. *Hollander* (*ubi sup.*).
(*d*) *Evans* v. *Walton*, L. R. 2 C. P. 615; 36 L. J. C. P. 307.

can be recovered; but where the loss of service by the parent cannot be sustained, it is very doubtful whether the parent could recover for such expenses, though under an obligation to incur them (*e*).

Enticement and Harbouring of Children.—The parent may also sustain an action against a person for wrongfully depriving him of his child's services, either by enticing it away, or by improperly harbouring it after it has left its home. Enticement is where the child is removed from the parental control without force; abduction, on the contrary, necessitates the employment of some force. Here again the right of action depends upon the relation of master and servant. If the parent has relinquished his right to the child's services, he cannot maintain such action, but as long as the child remains under his roof, his right to do so exists. Thus, an action will lie for enticing away the plaintiff's daughter, though there be no allegation that the defendant debauched her, or that there was any binding contract of service betwen her and the plaintiff (*f*). And where the plaintiff's daughter, nineteen years old, who resided with him as a member of his family, and assisted him in his business, by means of a fictitious letter of invitation dictated by the defendant, procured her mother's consent to her quitting her home for a few days, and left, and the defendant took her to a lodging-house, where he cohabited with her for nine days, after which she returned home, it was held that there was a sufficient continuing relation of master and servant *de facto*, and sufficient evidence of a wrongful enticing away of the daughter by the defendant, to entitle the plaintiff to maintain the action (*g*). So, too, where a person hires a girl as a servant, and withdraws her from her father's service for the very purpose of getting possession of her person and seducing her, this fraudulently concocted service does not put an end to the relation of master and servant previously subsisting between the daughter and her father, who may maintain an action for the seduction (*h*). As this action is founded on the loss of services, the right of the parent to bring it does not seem limited to the infancy of the child (*i*). Where the girl enticed away or abducted for

(*e*) See *Grinnell* v. *Wells*, 7 M. & G. 1033; *Hall* v. *Hollander* (*ubi sup.*). In America there is a tendency to be more liberal towards the parent. Sch. Dom. Rel. s. 258.

(*f*) *Evans* v. *Walton* (*ubi sup.*).

(*g*) *Ibid.*

(*h*) *Speight* v. *Oliviera*, 2 Stark. 495.

(*i*) See *Harper* v. *Luffkin*, 7 B. & C. 387.

immoral purposes is under eighteen, the guilty party may be criminally punished (*k*).

"To afford shelter is one thing; to encourage filial disobedience another. The mere employment of a runaway child does not amount to enticement. But where it appears that the defendant, knowing that the son had absconded from his father, boarded him in his family and allowed him to work on his farm as he pleased, doing this with the intention of aiding or encouraging, or with the knowledge that it aids and encourages the son to keep away from the father, he is liable to this action"(*l*). If the defendant had derived any benefit from the labour and services of the child, the parent would be entitled to recover the amount (*m*). The right to bring such actions belongs to the mother on the death of the father. It would also belong to her if on divorce or judicial separation she had the care and custody of her child; but there does not appear to be any authority one way or the other for her being able to maintain the action when she voluntarily lives apart from her husband, and is not judicially separated from him.

Action for Seduction of Daughter. The next point to be considered is the right of the parent to maintain an action for damages for the loss of services consequent upon the illness of a daughter who has been seduced and thereby become pregnant. This right of action is based (though fictitiously) upon the relations of master and servant; but inasmuch as a large majority of the actions are brought by parents in respect of the seduction of their daughters, and not by masters in the popular sense of the word for the seduction of their servants, it has been thought possible, without an excessive violation of the logical treatment of the subject, to discuss this action when dealing with the law of parent and child.

Relation of Master and Servant Necessary.—The basis of this action is the relationship of master and servant, with the loss of the services of the daughter consequent upon the wrongful act of the defendant; and, as will be seen, the services rendered by the daughter to support the fiction may not only be very

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(*k*) 48 & 49 Vict. c. 69, s. 7. See *Reg.* v. *Prince*, L. R. 2 C. C. R. 154; 44 L. J. M. C. 122.

(*l*) Sch. Dom. Rel. s. 260.

(*m*) *Foster* v. *Stewart*, 3 M. & S. 201. In America it is the law that the father may sue on the basis of a contract for his absconding son's wages, but is put to his election; and the suit in tort against the employer, for unlawfully enticing or harbouring his minor child, precludes the action of assumpsit for wages earned. *Thompson* v. *Howard*, 31 Mich. 309 (Amer.).

slight, but even constructive, that is, implied by law rather than evidenced by facts (*n*); but there must be some service, the loss of which forms the foundation of the action (*o*). The daughter herself has no remedy against her seducer, because, as it has been said, her own incontinence shall not be the means of obtaining a pecuniary compensation for any loss she may have sustained through it (*p*). But it was found necessary to punish seducers, and this action, whether founded on trespass or on the case, was devised for their punishment.

Constructive Service Sufficient.—Provided the relation of master and servant can be proved to have existed between the person seeking compensation and the person debauched, the services rendered by the latter to the former need not be real valuable services, but constructive services would be sufficient; and it is only necessary that the parent or master should have the legal right to an interest in them (*q*). Thus, others besides the father may maintain this action; a stranger in blood where the relation of master and servant exists between plaintiff and the person seduced (*r*), a brother (*s*), an aunt (*t*), and an adoptive father (*u*). An adjudication of sessions that the alleged father is not the father of the applicant's bastard child is not a judgment *in rem* on the paternity of the child so as to prevent a person entitled to bring an action for the seduction of the mother from bringing it (*x*). Whether a married woman living with her child apart from her husband, but not judicially separated, could maintain the action is doubtful. But the right to bring an action of this sort does not pass to the trustee of a master who has become bankrupt, as the trustee would have no right to make a profit of a man's wounded feelings (*y*). It is not necessary that the daughter should be under age; and the real question is whether or not she has been emancipated from her father's control; consequently, where a married daughter

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(*n*) *Fores* v. *Wilson*, 1 Peake, 77; *Grinnell* v. *Wells*, 7 M. & G. 1033; *Eager* v. *Grimwood*, 1 Exch. 61; *Manley* v. *Field*, 7 C. B. (N.S.) 96; *Terry* v. *Hutchinson*, L. R. 3 Q. B. 599; 37 L. J. Q. B. 257.

(*o*) *Whitbourne* v. *Williams*, [1901] 2 K. B. 722; 70 L. J. K. B. 933.

(*p*) *Saterthwaite* v. *Duerst*, 5 East, 47 n.

(*q*) See *Evans* v. *Walton*, L. R. 2 C. P. 615; 36 L. J. C. P. 307. In America the rule as to constructive service is carried even further than here. Sch. Dom. Rel. s. 261.

(*r*) *Fores* v. *Wilson* (*ubi sup.*).

(*s*) *Howard* v. *Crowther*, 8 M. & W. 601.

(*t*) *Edmondson* v. *Machell*, 2 T. R. 4.

(*u*) *Irwin* v. *Dearman*, 11 East, 23.

(*x*) *Anderson* v. *Collinson*, [1901] 2 K. B. 107; 70 L. J. K. B. 620.

(*y*) *Howard* v. *Crowther*, 8 M. & W. 601.

was living with her father, and performing various acts of service for him, it was held that the father was entitled to bring the action on the establishment of the relationship of master and servant between him and his daughter, and that the defendant as a wrong-doer could not set up the right of her husband to the services of the plaintiff's daughter (*z*). On the contrary, if the plaintiff's unmarried infant daughter be in the service of another at the time of her seduction, the action will not lie (*a*). The following cases will show the circumstances under which this action may be sustained, and when it will fail, and that the relationship of master and servant and consequent loss of services on the part of the former are absolutely necessary to its successful maintenance.

When Action Successful.—Where the person seduced resides at the plaintiff's home, no proof of actual service need be given if the plaintiff has the right to demand her services (*b*); very slight evidence of such services is requisite (*c*), such as milking cows (*d*), making tea (*e*), and the like; and this equally for a niece (*f*) as for a daughter. The person seduced need not be at the beck and call of the plaintiff, as where the plaintiff's daughter lived with her brother, but went every day to her father's house to do all the household work (*g*); or where she resided some distance off, but acted as mistress of a household belonging to her father (*h*), or was temporarily engaged in service (*i*), or only performed services for him after her day's work was over (*k*). The action has also been maintained where she had left her situation, and was seduced on the way home to her father's house (*l*), for a fresh entering into her father's service on her leaving her situation was assumed (*m*). Where the father's control over the services of his daughter is put an end to by the wrongful act of the defendant, the defendant will not be allowed to avail himself of his own wrong, but the service will be deemed to be continued through the tortious interruption (*n*).

(*z*) *Harper* v. *Luffkin*, 7 B. & C. 387; and see *O'Reilly* v. *Glavey*, 32 L. R. Ir. 316.
(*a*) *Davies* v. *Williams*, 10 Q. B. 725.
(*b*) *Maunder* v. *Venn*, M. & M. 323.
(*c*) *Manvell* v. *Thomson*, 2 C. & P. 303.
(*d*) *Bennett* v. *Alcott*, 2 T. R. 168.
(*e*) *Carr* v. *Clarke*, 2 Chit. Rep. 260.
(*f*) *Manvell* v. *Thomson* (*ubi sup.*).
(*g*) *Mann* v. *Barrett*, 6 Esp. 32.
(*h*) *Holloway* v. *Abel*, 7 C. & P. 528.
(*i*) *Griffiths* v. *Teetgen*, 15 C. B. 344.
(*k*) *Rist* v. *Faux*, 32 L. J. Q. B. 386; *Ogden* v. *Lancashire*, 15 W. R. 158.
(*l*) *Terry* v. *Hutchinson*, L. R. 3 Q. B. 599; 37 L. J. Q. B. 257.
(*m*) See *Gladney* v. *Murphy*, 26 L. R. Ir. 651.
(*n*) *Speight* v. *Oliviera*, 2 Stark. 493; *Long* v. *Keightley*, 11 Ir. C. L. 221. See also *Evans* v. *Walton*, L. R. 2 C. P. 615; 36 L. J. C. P. 307.

Action Unsuccessful.—This action cannot be maintained where there has been only seduction, and no pregnancy or sickness causing loss of service (*o*), for some proof of loss of service is necessary (*p*); or where the plaintiff has connived at his daughter's unchastity (*q*); or where the person seduced is in the service of another (*r*); and she is seduced by her own master, where he has not hired her for purposes of seduction (*s*), whether she intended to return to the plaintiff on the termination of the service (*t*), or not (*u*); even though the seduction during her temporary absence from work took place under her parent's roof (*x*); or where she goes home occasionally, and performs some domestic services in her parent's house (*y*); or where the relation of master and servant is contracted after the seduction, for the loss of service cannot then be made the foundation of the action (*z*). Where the daughter seduced is the real head of the house, this action is not maintainable by her father (*a*).

Damages for Injured Feelings.—There is an important difference between the action brought by the parent or master for an assault and battery, &c., on his child or servant and this action, for in the former no compensation is to be given for wounded feelings, whereas in this action what are known as "sentimental damages" may be given. This is an instance of the bad logic of the action as now founded. Tindal, C.J., in *Grinnell* v. *Wells*, thus states the law: "As the father is only liable under the statute (43 Eliz. c. 2, s. 6) to maintain his daughter where he is of sufficient ability so to do, and as the damages recoverable by the father when he brings the action are, confessedly, not limited to the actual expenditure of his money, but may be given according to the circumstances of aggravation in the particular case, the right of action to recover compensation would be confined to persons of ability to maintain the daughter, and would be denied to the poorer orders of the community—a result that would be most unreasonable" (*b*).

(*o*) *Saterthwaite* v. *Duerst*, 5 East, 47 n; *Eager* v. *Grimwood*, 1 Exch. 61.
(*p*) *Grinnell* v. *Wells*, 7 M. & G. 1033.
(*q*) *Reddie* v. *Scoolt*, 1 Peake, 316.
(*r*) *Dean* v. *Peel*, 5 East, 45; *Harris* v. *Butler*, 2 M. & W. 539; *Thompson* v. *Ross*, 29 L. J. Ex. 1.
(*s*) *Gladney* v. *Murphy* (*ubi sup.*).
(*t*) *Blaymire* v. *Haley*, 6 M. & W. 55; *Gladney* v. *Murphy* (*ubi sup.*).
(*u*) *Dean* v. *Peel* (*ubi sup.*).
(*x*) *Hedges* v. *Tagg*, L. R. 7 Ex. 283; 41 L. J. Ex. 169.
(*y*) *Whitbourne* v. *Williams*, [1901] 2 K. B. 722; 70 L. J. K. B. 933.
(*z*) *Davies* v. *Williams*, 10 Q. B. 725.
(*a*) *Manley* v. *Field*, 7 C. B. (N.S.) 96.
(*b*) 7 M. & G. 1033, 1043. But, as the learned reporter notes: "It may be

For the evidence to be adduced in aggravation of damages because of the heartless conduct of the defendant, or in mitigation because of the conduct of the person seduced, see Addison on Torts (*c*), and Smith's Master and Servant (*d*).

Lord Campbell's Act.—As a necessary branch of this subject, the right of the parents to recover damages for injuries causing the death of children, and the corresponding rights of children to recover damages for injuries causing the death of their parents, will next be discussed. It was and is a rule of law that if injuries wrongfully inflicted upon a person cause his death, no right of action exists (*e*); the only exception to this rule is that brought into being under Lord Campbell's Act, 1846 (*f*). The preamble of that statute says that "no action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another person"; then the statute goes on to enact, that when the death is caused by such wrongful act, and the person fatally injured might have recovered damages in respect of such injury, the right of action shall survive for the benefit of the "wife husband parent and child of the person whose death shall have been caused," and may be brought by the executor or administrator of the deceased. If there is no executor or administrator, or the personal representative does not bring the action within six months of the death, then, under 27 & 28 Vict. c. 95, the persons beneficially interested in the action may bring it for themselves. Damages are assessed according to the injury sustained by the different parties for whose loss the action is brought, and the jury apportion the amount between the different persons.

The action must be brought within a year from the death (*g*),

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observed, however, that the *quasi*-fiction of *servitium amisit* affords protection to the rich man whose daughter occasionally makes his tea, but leaves without redress the poor man, whose child . . . is sent unprotected to earn her bread amongst strangers."

(*c*) Pp. 856, 857. (*d*) Pp. 179-181.

(*e*) *Higgins* v. *Butcher*, Yelv. 89; *Baker* v. *Bolton*, 1 Camp. 493; *Osborn* v. *Gillett*, L. R. 8 Ex. 88; 42 L. J. Ex. 53. In this case Bramwell, B., dissented from the majority of the Court and held that the action would lie. His Lordship said that the rule of law as set out above was derived from a mistaken apprehension of the maxim, "*actio personalis moritur cum persona*," and that the "death of the action" referred to the incapacity of the deceased to bring the action, which died with him, but did not refer to the right which a master had to bring an action for loss of services occasioned by the injury or death of his servant. In 1881 his Lordship was of the same opinion: see Solicitors' Journal, Auguse 27, 1881, p. 813. Some of the American courts support the view taken by Lord Bramwell.

(*f*) 9 & 10 Vict. c. 93.

(*g*) *Ibid.* s. 3; 27 & 28 Vict. c. 95, s. 1.

whether by the personal representatives, or the persons beneficially interested. A child *en ventre sa mère* (*h*), but not a bastard (*i*), is within the remedy of Lord Campbell's Act. Contributory negligence on the part of the deceased will be a bar to the representatives of the deceased maintaining the action (*k*). There must be some proof of damage or the action will fail (*l*), but a reasonable expectation of pecuniary advantage may be taken into consideration by the jury (*m*). The cost of the support of the deceased has to be taken into account in estimating the pecuniary loss sustained by reason of his death, but though no actual evidence is given of the exact benefit derived from the deceased, or the cost of his keep, there is a case to go to the jury for pecuniary compensation (*n*). Where the cost of the support is greater than any benefit derived from the deceased there is no case for compensation (*o*). Damages for "wounded feelings" (*p*), or for funeral expenses (*q*), cannot be given.

This action can be brought by the child for injuries resulting in the death of the "parent" (*r*); and the principles which have been laid down above as regulating the bringing and maintaining of actions in the case of parents are the same as those in the case of children. Where executors receive money by way of compensation for injuries causing the death of their testator without bringing an action under this Act, but proceed in the Chancery Division for a declaration as to the persons entitled, the Court can distribute it among the relatives of the deceased who are entitled to it as having suffered damage by the death of their relative, as though it were a jury under this Act (*s*). Children of workmen killed during their employment, including an illegitimate child and a grandchild, if dependent on his earnings, are entitled to compensation, if such employment was

(*h*) *The George and Richard*, L. R. 3 A. & E. 466.
(*i*) *Dickinson* v. *North-Eastern Railway Co.*, 33 L. J. Ex. 91.
(*k*) *Dynen* v. *Leach*, 26 L. J. Ex. 221; *Waite* v. *North-Eastern Railway Co.*, 28 L. J. Q. B. 258.
(*l*) *Duckworth* v. *Johnson*, 4 H. & N. 653; 29 L. J. Ex. 25.
(*m*) *Pym* v. *Great Northern Railway Co.*, 31 L. J. Q. B. 249.
(*n*) *Wolfe* v. *Great Northern Railway Co.* (*Ireland*), 26 L. R. Ir. 548. In this case the Court of Appeal approved of *Duckworth* v. *Johnson* (*ubi sup.*), and held that the onus of proof required in the case of *Hull* v. *Great Northern Railway Co.*, 26 L. R. Ir. 289, was satisfied, and the onus of disproof was shifted to the defendant company.
(*o*) *Hull* v. *Great Northern Railway Co.* (*Ireland*) (*ubi sup.*).
(*p*) *Blake* v. *Midland Railway Co.*, 21 L. J. Q. B. 233.
(*q*) *Dalton* v. *South-Eastern Railway Co.*, 27 L. J. C. P. 227; see *Osborn* v. *Gillett*, L. R. 8 Ex. 88; 42 L. J. Ex. 53.
(*r*) 9 & 10 Vict. c. 93, s. 2.
(*s*) *Bulmer* v. *Bulmer*, 25 Ch. D. 409; 53 L. J. Ch. 402.

within the provisions of the Workmen's Compensation Act, 1906 (*t*). A posthumous illegitimate child has been held to be within the definition (*u*).

SECTION 2.

Liability of Parent for Torts done by Child.

If the father authorizes a tort, he is liable; or if he employs his child in a particular employment, and in the course and scope of that employment the child commits a tort, no doubt the principle which renders a master liable for the tortious acts of his servant committed within the scope of his employment and limits of his authority would be applied, and the father held liable for the tort (*x*). But there is a dictum to the effect that "the tendency of juries, where persons under age have incurred debts or committed wrongs, to make their relatives pay, should be checked by the Courts," on the ground that "no man ought, as a general rule, to be responsible for acts not his own" (*y*). On the whole, it may be stated as a rule that a father is not liable in damages for the torts of his child committed without his knowledge, consent, or sanction, and not in the course of his employment of the child (*z*).

(*t*) 6 Edw. VII. c. 58.
(*u*) *Orrell Colliery Co.* v. *Schofield*, [1909] A. C. 433.
(*x*) See *post*, Master and Servant, Part V.
(*y*) Per Willes, J., in *Moon* v. *Towers*, 8 C. B. (N.S.) 611, 616.
(*z*) Sch. Dom. Rel. s. 263; *Moon* v. *Towers* (*ubi sup.*).

CHAPTER VI.

ILLEGITIMATE CHILDREN.

An illegitimate child, or bastard (*a*), is one who is born out of lawful wedlock. A child is legitimate provided that its parents are lawfully married at the date of its birth, and it is immaterial whether they were married or not at the time of its conception. But where the child is posthumous, or born after the death of its father, the time at which it was conceived becomes of great importance; if born within the furthest period allowed for gestation from the date of the death of its mother's late husband, it will be presumed to be his child, and so legitimate; but if born without that period, it will be held to be a bastard (*b*).

Presumption of Legitimacy.—The English law may be somewhat stern in its treatment of bastards, but it does not lightly come to the conclusion that a child born of a married woman is not legitimate; on the contrary, the presumption of law is that it is legitimate. This legal presumption is not to be rebutted by circumstances which create only doubt and suspicion, such as adultery by the mother (*c*). It may, however, be displaced by proof of such facts, as, for instance, that the husband was incompetent; was entirely absent, so as to have no intercourse or communication of any kind with the mother; or was entirely absent at the period during which the child must, in the course of nature, have been begotten; or was only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse. Such evidence as this would establish the illegitimacy of the child of a married woman (*d*).

(*a*) There is some doubt as to the etymology of the term "bastard." The more recent writers would derive it from *bast*, signifying a pack-saddle, and the suffix *ard*, and its meaning would be "son of a bast, or pack-saddle," that is, not of a bed, as a lawful son or child ought to be. In former times the muleteers who went up and down the country with their wares, were in the habit of sleeping in the outhouses of the inns on their pack-saddles instead of beds. See Skeat's Etymological Dictionary of the English language. The Greek equivalent is *νόθος*, as opposed to *γνήσιος*, and the Latin is *spurius* "unde solent spurii filii appellari, vel a græcâ voce, quasi *σποράδην* concepti, vel quasi sine patre filii." Gaius, lib. i. s. 64.

(*b*) See *ante*, p. 480.

(*c*) *Gordon* v. *Gordon and Gordon*, [1903] P. 141; 72 L. J. P. 33.

(*d*) *Hargrave* v. *Hargrave*, 9 Beav. 552.

So the husband of a married woman who bears a full-time child well within the ordinary period of gestation from the date of the marriage may show that he had not had any pre-nuptial intercourse with her (*e*). But a husband cannot indirectly bastardize the child of his wife by evidence of non-access after marriage where access to her was possible during the period of gestation (*f*). But if (as it can only be) non-access of the husband is proved from other sources (*g*), then the mother may give evidence to prove the paternity of her child (*h*). The mother (*i*), or father (*k*), is a competent witness to prove that she was never married, and that, consequently, her or his reputed children are illegitimate. See further, Legitimacy, c. 1, *ante*.

Admissibility of Other Evidence.—The admissions of a deceased person as to his illegitimacy are receivable in evidence in proof of his bastardy (*l*); and family tradition may be proved to corroborate such admissions of the deceased as to his illegitimacy (*m*). Declarations by a reputed father contained in business letters written in his name and under his dictation as to the date of birth of his reputed children may be admitted as evidence after his death, of the date of their birth, upon the question of their legitimacy, though such evidence would tend to prove that they were bastards (*n*); and in pedigree cases, where the legitimacy of a child born in wedlock is in issue, previous statements by the mother that the child is a bastard are admissible as evidence of her conduct, though such statements could not be made by her as a witness called to give evidence (*o*). Evidence, too, of verbal statements made by the paramour of the wife with whom he was living is admissible as evidence of conduct tending to show he was the father of the child (*p*).

Action to Perpetuate Testimony.—An action may be brought to perpetuate testimony for the purpose of proving the

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(*e*) *Poulett Peerage*, [1903] A. C. 395; 72 L. J. K. B. 924, overruling *Anon.* v. *Anon.*, 22 Bea. 481; 23 Beav. 273.

(*f*) *Hewat's Divorce Bill*, 12 App. Cas. 312; *Russell* v. *Russell*, [1924] A. C. 687; 93 L. J. P. 97.

(*g*) See *Rex* v. *Kea*, 11 East, 132.

(*h*) *Legge* v. *Edmonds*, 25 L. J. Ch. 125.

(*i*) *Rex* v. *Bramley*, 6 T. R. 330.

(*k*) *Rex* v. *St. Peter's*, Burr. S. C. 25.

(*l*) *Her Majesty's Procurator-General* v. *Williams*, 31 L. J. P. & M. 157; *Re Perton* (deceased), *Pearson* v. *Att.-Gen.*, 53 L. T. 707.

(*m*) *Re Perton* (deceased), *Pearson* v. *Att.-Gen.* (*ubi sup.*).

(*n*) *Re Turner*, *Glenister* v. *Harding*, 29 Ch. D. 985.

(*o*) *Aylesford Peerage Case*, 11 App. Cas. 1.

(*p*) *Burnaby* v. *Baillie*, 42 Ch. D. 282; 58 L. J. Ch. 842.

illegitimacy of a child where the wife of a lunatic husband has committed adultery, and given birth to a child which is alleged to be a bastard (*q*).

Legitimation.—The Roman or civil law doctrine is contained in the maxim, *pater est quem nuptiæ demonstrant;* and one of its effects is that where the parents of a bastard marry, the subsequent marriage confers the status of legitimacy upon the child. This privilege prevails in all countries the laws of which are based upon the civil code, and in most of the United States of America. But bastards are of two kinds; they are either incestuous and adulterous on the one hand, when conceived or born during the marriage of one of the parents; or spurious on the other, called also *vulgo quæsiti*, when born of promiscuous intercourse. The principal distinction between the two is this, that the latter may be legitimated *per subsequens matrimonium*, but the former (it is thought) never (*r*). Now this privilege of legitimation has never prevailed in the English legal system, and the law may be thus stated, "once a bastard always a bastard." An attempt was made by the bishops in the time of Henry III. to introduce the canon law doctrine, but the peers successfully resisted the proposed innovation (*s*). But except in the matter of succession as heir to real property (*t*), where a child is born before the marriage of his parents, if his father is domiciled in a country (at the time of the birth of the child and at the time of the subsequent marriage with the mother) whose laws recognize legitimation *per subsequens matrimonium*, the status of legitimacy of such child will be recognized by the laws of this country (*u*).

Bastards within the Prohibited Degrees of Kinship.—Strictly speaking, a bastard is *filius nullius*, that is, in the eye of the law he has no parent on whom he has any enforceable claim, or from whom he can derive any rights. But bastards equally with legitimate persons are within the prohibited degrees of consanguinity and affinity; and their

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(*q*) *Re Stoer*, 9 P. D. 120. See this case for the course to be pursued under Ord. XXXVII. r. 35 of the R. S. C. 1883.

(*r*) Fras. Par. & Ch. 119.

(*s*) See *ante*, p. 480. A bill introduced for effecting legitimation failed to obtain the support of the Legislature in December, 1925. Fuller details of how bastardy may be proved or rebutted, and of the consequences flowing from it, are given above in chap. i., Legitimacy.

(*t*) *Birtwhistle* v. *Vardill*, 7 Cl. & F. 895.

(*u*) *Re Goodman's Trusts*, 17 Ch. D. 266; 50 L. J. Ch. 425; *Re Grove, Vaucher* v. *Solicitor to the Treasury*, 40 Ch. D. 216; 58 L. J. Ch. 57; *Re Grey's Trusts, Grey* v. *Stamford*, [1892] 3 Ch. 88; 61 L. J. Ch. 622.

marriages within those degrees are incestuous and void (*x*). The civil law doctrine of *partus sequitur ventrem*, which recognizes a *legal* tie between the mother and her child, and enables a bastard to succeed to her personal property, has no application in English law. Bastards have no next of kin in the eye of the law, and such cannot be created for them by testamentary disposition (*y*).

But the tendency and growth of the law has been towards a more liberal recognition of the rights and duties of the parents towards their bastard offspring, and to regard the latter more as children of, than strangers to, the former. Thus, the mother has the right in the care and custody of her child while within the years of nurture; for as the maternity is capable of satisfactory proof, she is marked out by nature as its proper custodian. The mother also is primarily the person whose consent to the marriage of an illegitimate infant is required under the Guardianship of Infants Act, 1925, and in the event of her death consent is required from the guardian appointed by her (*z*).

Rights and Disabilities of Bastard.—The rights of a bastard at common law are not numerous, and such as they are he must acquire for himself, and cannot inherit. He can now claim during his tender years the statutory as well as moral right to be supported by his parents (*a*). He may, it seems, acquire a right to a surname by reputation (*b*).

Legacies.—Though a bastard cannot inherit, yet under certain circumstances, legacies, and bequests made in his favour, and in the capacity of child of his parents, are held good and valid. It is true that the "description child, son, issue, every word of that species, must be taken *prima facie* to mean legitimate child, son, or issue" (*c*); but bastards can take a legacy or bequest under the term "children" already born, if sufficiently designated or described, or have acquired the reputation of being children or issue (*d*), and both legitimate

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(*x*) *Reg.* v. *Brighton (Inhabitants of)*, 30 L. J. M. C. 197. See *ante*, p. 42.
(*y*) *Re Wood, Wood* v. *Wood*, [1902] 2 Ch. 542; 71 L. J. Ch. 723.
(*z*) 15 & 16 Geo. V. c. 45, Schedule.
(*a*) See *post*, pp. 594 *et seq.*
(*b*) Co. Litt. 3.
(*c*) Per Eldon, C., in *Wilkinson* v. *Adam*, 1 V. & B. 42; *Dover* v. *Alexander*, 12 L. J. Ch. 175; *Re Cullum, Mercer* v. *Flood*, [1924] 1 Ch. 540; 93 L. J. Ch. 281.
(*d*) *Hill* v. *Crook*, L. R. 6 H. L. 265; *O.* v. *D.*, [1916] 1 Ir. R. 364; *Re Helliwell, Pickles* v. *Helliwell*, [1916] 2 Ch. 580; 86 L. J. Ch. 45; 42 L. J. Ch. 702; *Re Bleckley, Sidebotham* v. *Bleckley* [1920] 1 Ch. 450; 89 L. J. Ch. 290.

and bastard children can take together under the like denomination and description of "children," &c. (*e*); and from this it follows that a bastard cannot take by the description of "child" of his reputed father, until he has acquired the reputation of being such child (*f*). An unmarried man made a bequest "to my children," &c., and parol evidence was allowed to show whom the testator considered in the character of children, and they having obtained a name by reputation, were admitted to take as a class, though illegitimate and not named in the will (*g*). Where a testatrix bequeathed to A, "the eldest daughter of my deceased daughter S, my gold watch," and she bequeathed other property to trustees "in trust for such of the children of my said deceased daughter S, who shall attain twenty-one, absolutely, equally, share and share alike, the shares of such of them as shall be daughters to be for their sole and separate use"; S had two legitimate children, a son and a daughter, and she had also an illegitimate daughter, who was the person spoken of in the will as "A, the eldest daughter of S"; it was held that there was a sufficient indication of an intention that A should be included in the description of "the children of S" (*h*). And a bequest to children was held to include an illegitimate child referred to earlier in the will as "my daughter" (*i*). It is the intention that the illegitimate child shall take that makes the bequest good (*k*). But any reference to an illegitimate child that involves an inquiry as to his paternity will disentitle the bastard child to take (*l*). "The principle which may fairly be extracted from the cases upon this subject is this—the term 'children' in a will *prima facie* means legitimate children, and if there is nothing more in the will, the circumstance that the person whose children are referred to has illegitimate children will not entitle those illegitimate children to take (*m*). But there are two classes of cases in which that *prima facie* interpretation is departed from. One class of cases is where it is impossible from the circum-

(*e*) *Hill* v. *Crook*, L. R. 6 H. L. 265; 42 L. J. Ch. 702, affirming L. R. 6 Ch. 311.
(*f*) *Wilkinson* v. *Adam*, 1 V. & B. 42.
(*g*) *Beachcroft* v. *Beachcroft*, 1 Madd. 430.
(*h*) *Re Humphries*, *Smith* v. *Millidge*, 24 Ch. D. 691.
(*i*) *O.* v. *D.*, [1916] 1 Ir. R. 364.
(*k*) See *Harris* v. *Lloyd*, T. & R. 310.
(*l*) Per Bowen, L.J., in *Re Bolton*, *Brown* v. *Bolton*, 31 Ch. D. 542; 55 L. J. Ch. 398.
(*m*) See *Dorin* v. *Dorin*, L. R. 7 H. L. 568; *Re Walker*, *Walker* v. *Lutyens*, [1897] 2 Ch. 238; 66 L. J. Ch. 622; and *Re Smilter*, *Bedford* v. *Hughes*, [1903] 1 Ch. 198; 72 L. J. Ch. 102.

stances of the parties that any legitimate children could take under the bequest. A familiar example of that might be given in this way: Suppose there is a bequest 'to the children of my daughter Jane,' Jane being dead, and having left illegitimate children, but having left no legitimate children. There, inasmuch as the testator must be taken to have known the state of his family, and must be taken to have intended to benefit some children of his daughter Jane, and inasmuch as she had no children who could be benefited except illegitimate children, rather than that the bequest should fail altogether, the Courts will hold that illegitimate children are intended, and they will take under the term 'children' . . . The other class of cases is of this kind: Where there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term 'children' not merely according to its *prima facie* meaning of legitimate children, but according to a meaning which will apply to, and which will include illegitimate children" (*n*). A gift to nephews and nieces and their children was held to include legitimate children of the testator's illegitimate sister (*o*). So, too, where there was no evidence that the testatrix knew of her own illegitimacy the expression "right heirs" may be accepted as though she were legitimate (*p*). But where there is no evidence on the face of the will that the testator intended illegitimate children to take, legitimate children alone will take (*q*); though from circumstances *dehors* the will it might be inferred that the testator meant and intended that the term "children" should include and designate illegitimate ones (*r*). If there are no legitimate children to take, though in the circumstances of the parties a legitimate child might have come into existence, then a bequest to "children" will fail (*s*). The rule of law that where there is a gift to children an illegitimate child cannot take does not apply to a gift over of property by a testator who has designated an illegitimate child as a "child"; and such illegitimate child will take under the bequest (*t*); so where a person born before

(*n*) Per Cairns, C., in *Hill* v. *Crook*, L. R. 6 H. L. 265, 282; 42 L. J. Ch. 702. See *Coles* v. *Jones*, 78 L. T. J. 60.

(*o*) *Re Helliwell, Pickles* v. *Helliwell*, [1916] 2 Ch. 580; 86 L. J. Ch. 45.

(*p*) *Re Cullum, Mercer* v. *Flood*, [1924] 1 Ch. 540; 93 L. J. Ch. 281.

(*q*) *Dorin* v. *Dorin* (*ubi sup.*); *Re Hazledine, Grange* v. *Sturdy*, 31 Ch. D. 511; *Re Lowe, Danily* v. *Platt*, 61 L. J. Ch. 415.

(*r*) *Dorin* v. *Dorin* (*ubi sup.*).

(*s*) *Re Brown, Penrose* v. *Manning*, 63 L. T. 159.

(*t*) *Smith* v. *Jobson*, 59 L. T. 397.

the testator's will was made was designated as a "child" of the "wife" of a particular person, though she was, to the knowledge of the testator, not the legal wife of that person, such "child" took under the will (*u*). Where it is clear from the construction of the will that the testator intended illegitimate children to be recipients of his bounty, they will take though they are described or designated only as his "relatives" (*x*); or as "persons entitled under the Statute of Distributions" (*y*); and there are legitimate persons who also fulfil the foregoing descriptions (*z*). If the persons so described take by way of a gift over, such gift over is cogent evidence that they should take notwithstanding their illegitimacy. But a bastard child whose existence was unknown to the testator cannot take under the description of "child" of its parent (*a*).

Bastard en Ventre sa Mere.—A bastard child *en ventre sa mere* at the date of the will of the testator will take if sufficiently indicated (*b*); "but if a child is described with reference to its father there seems to be considerable doubt whether the bequest is not void for uncertainty. To establish the fact of paternity would involve an inquiry which the law will not allow, and it is doubtful whether an illegitimate child can acquire a title by repute till it is born" (*c*).

Future Illegitimate Children.—Future illegitimate children born between the date of the testator's will and his death, who are sufficiently designated and have acquired at the time of the testator's death the reputation of being "children" will take (*d*); even though where illegitimate they are believed to be legitimate (*e*). There must be a clear reference to the children, and not a mere reference that involves an inquiry as to their paternity (*f*). A bastard child born after the testator's death cannot be entitled under such a description or

(*u*) *Re Horner, Eagleton* v. *Horner*, 37 Ch. D. 695; 57 L. J. Ch. 211; *Re Harrison, Harrison* v. *Higson*, [1894] 1 Ch. 561; 63 L. J. Ch. 385.

(*x*) *Re Joddrell, Joddrell* v. *Seale*, 44 Ch. D. 590; 59 L. J. Ch. 538.

(*y*) *Re Wood, Wood* v. *Wood*, [1902] 2 Ch. 542; 71 L. J. Ch. 723; overruling *Re Standley's Estate*, L. R. 5 Eq. 303.

(*z*) See *Re Joddrell, Joddrell* v. *Seale (ubi sup.)*.

(*a*) *Re Mayo, Chester* v. *Keirl*, [1901] 1 Ch. 404; 70 L. J. Ch. 261.

(*b*) *Crook* v. *Hill*, 3 Ch. D. 773; 46 L. J. Ch. 119.

(*c*) Theob. Wills, 266, citing *Earle* v. *Wilson*, 17 Ves. 528.

(*d*) *Occleston* v. *Fullalove*, L. R. 9 Ch. App. 147; 43 L. J. Ch. 297. This case overrules on this point *Howarth* v. *Mills*, L. R. 2 Eq. 389; but in it Lord Selborne, C., dissented, and the decision is not in accordance with certain dicta which fell from Lords Chelmsford and Colonsay in *Hill* v. *Crook*, L. R. 6 H. L. 265; 42 L. J. Ch. 702; *Re Hastie's Trusts*, 35 Ch. D. 728; 57 L. J. Ch. 792. See *Savage* v. *Robertson*, L. R. 7 Eq. 176.

(*e*) *Re Du Bochet, Mansell* v. *Allen*, [1901] 2 Ch. 441.

(*f*) *Re Bolton, Brown* v. *Bolton*, 31 Ch. D. 542; 55 L. J. Ch. 398.

designation (*g*), unless it happens to be *en ventre sa mere* at the date of the testator's death (*h*). This rule is based upon the principle that gifts to such future illegitimate children are *contra bonos mores*, and direct inducements to immorality, and discourage marriage, which the law favours. An illegitimate child, though *en ventre sa mere* at the time of a deed, will not take under the description of "child" in the deed without clear words of reference to it (*i*). But a great distinction is to be drawn between the gifts to illegitimate children whether by deed or will by the putative father or the mother; a gift by the latter cannot be deemed to be against *bonos mores* or policy of the law (*k*).

Disabilities.—The disabilities of bastards are in modern times principally confined to their incapacity to inherit titles and lands, or succeed *ab intestato* to personal property under the Statute of Distributions. As a consequence of this a bastard cannot have any heirs except such as are the lawful issue of his own body; so, too, legitimate persons alone can take under the Statute of Distributions. This is an important and far-reaching disability. Blackstone gives the above instance as the only difference between legitimate and illegitimate persons, and goes on to say (*l*): "And really any other distinction but that of not inheriting, which civil policy renders necessary, would, with regard to the innocent offspring of his parent's crimes, be odious, unjust, and cruel to the last degree." But as a matter of fact their disability extends beyond this limit—thus, a bastard cannot avail himself of the benefits conferred by Lord Campbell's Act (*m*) in compensation for losses sustained by the death of certain relatives (*n*). A bastard though adopted by and known by repute as the child of its putative father, is a stranger to him, so far as concerns an effectual appointment of a testamentary guardian by the latter under 12 Car. II. c. 24 (*o*). But in an Irish case, a reputed father having named his executor as guardian of his natural child, the Lord Chancellor, though

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(*g*) *Crook* v. *Hill*, 3 Ch. D. 773; 46 L. J. Ch. 119; *Holt* v. *Sindrey*, L. R. 7 Eq. 170; 38 L. J. Ch. 126; *Re Lowe, Danily* v. *Platt* (*ubi sup.*).

(*h*) *Ibid.* But in *Re Bolton, Brown* v. *Bolton* (*ubi sup.*), Fry, L.JJ., said it was a question of doubt whether a child *en ventre sa mère* at a testator's death could have the reputation of being his child.

(*i*) *Re Shaw, Robinson* v. *Shaw*, [1894] 2 Ch. 573; 63 L. J. Ch. 770.

(*k*) Per Deane, J., in *The Estate of Frogley*, [1905] P. 137; 74 L. J. P. 72.

(*l*) 1 Com. 459.

(*m*) 9 & 10 Vict. c. 93.

(*n*) *Dickinson* v. *North-Eastern Railway Co.*, 33 L. J. Ex. 91.

(*o*) *Sleeman* v. *Wilson*, L. R. 13 Eq. 36.

holding that the child could have no guardian except by appointment of the Court, made the appointment of the person named, without a reference to the Master (*p*). Again, where a power exercised on behalf of an illegitimate child is defective, the Court of Chancery will not supply relief against the defective execution in favour of such child (*q*). So where a testator leaves a legacy to a bastard child, interest upon it is not payable at once from the testator's death, as in the case of a legitimate child (*r*), unless the testator directly orders maintenance out of the interest (*s*).

Property Left by Bastard.—If a bastard possessed of property, real or personal, dies intestate without leaving a widow or legitimate children the Crown took by escheat, and now under the Administration of Estates Act, 1925 (*t*) as *bona vacantia*. The Law of Property Act, 1925 (*u*), provides that section 3 of the Wills Act, 1837 (*x*), shall (without prejudice to the rights and interests of a personal representative) authorize and be deemed always to have authorized any person to dispose of real property or chattels real by will notwithstanding that by reason of illegitimacy or otherwise he did not leave an heir or next of kin surviving him.

Primary Right of Custody in Mother.—As regards the custody of the child the Courts carry out in part the spirit of the maxim *partus sequitur ventrem*, and assign primarily to the mother the care and control of her infant child, not only within the age of nurture, but beyond, for now by statute a pauper mother and her bastard child are inseparable till the latter reaches the age of sixteen, or on marriage, if a female, when it can acquire an independent settlement for itself (*y*). In cases which did not arise under the statute, the Courts would follow its analogy, and primarily assign the custody of the

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(*p*) *Barry* v. *Barry*, 1 Moll. 210. But see the Scottish case of *Brand* v. *Shaws* (16 Ct. of Sess. Cas. 315), which decided that the Guardianship of Infants Act, 1886, which entitles a mother to appoint a testamentary guardian to her infant children is not applicable to the case of a bastard child. But now see the Guardianship of Infants Act, 1925. where in the schedule of consents required to the marriage of an infant, the mother of an illegitimate child has the sole power, or if she is deprived of the custody, the guardian appointed by the Court, or if she is dead the guardian appointed by the mother.

(*q*) *Crickett* v. *Dolby*, 3 Ves. 10.

(*r*) *Lowndes* v. *Lowndes*, 15 Ves. 301; *Dowling* v. *Tyrrell*, 2 R. & M. 343.

(*s*) See *Beckford* v. *Tobin*, 1 Ves. 308; *Perry* v. *Whitehead*, 6 Ves. 546.

(*t*) 15 Geo. V. c. 23, s. 46 (1) (vi.).

(*u*) 15 Geo. V. c. 20, s. 178.

(*x*) 1 Vict. c. 26.

(*y*) 4 & 5 Wm. IV. c. 76, s. 71; 39 & 40 Vict. c. 61, s. 35.

bastard child to its mother. It has accordingly been held that the mother is entitled to the custody of her infant child in preference to the father, though from his circumstances he may be better able to educate it (*z*). And if the putative father obtains possession of the child by fraud (*a*), or force (*b*), the Court on *habeas corpus* will order it to be restored to the mother. Though where the mother had left the child in the custody of the mother of its father, she contributing to its support so far as she could, on an application by the mother of the child for its custody it was held that only on proof by the mother (upon whom the onus lay) of her ability to provide for and to give personal attention to the child was she entitled to an order transferring the custody to her (*c*). The mother of a bastard child cannot legally contract with another person to transfer to him her rights and liabilities with respect to the child, any more than the parent of a legitimate child can so contract (*d*).

When Father's Right Recognized.—The right of the father to the custody has been recognized, though not fully at first; thus, where he had the custody of the child fairly, the Court was loath to take it away from him (*e*); so where the mother of a bastard child between eleven and twelve years of age obtained a *habeas corpus* to compel the putative father to bring her before the Court, and the child was brought up before the Court, the latter declared her entitled to exercise her own discretion as to whither she would go, and would not allow her mother to take her against her will (*f*). In an Irish case (*g*), his right to the custody has been maintained. Indeed, this *natural* relationship between the child and its parents and other relatives is largely recognized both in law and equity (*h*); and except under special circumstances the putative father is, after the mother's death, entitled to the custody of the child (*i*). This claim is not based upon any strict legal right arising out of the legal position of parent and child, or upon any title in the parents to the legal guardianship of their infant child,

(*z*) *Ex parte Knee*, 1 B. & P. N. R. 148.
(*a*) *Rex* v. *Soper*, 5 T. R. 278.
(*b*) *Rex* v. *Hopkins*, 7 East, 579.
(*c*) *Walter* v. *Culbertson*, [1921] S. C. 490; 58 Sc. L. R. 401.
(*d*) *Humphreys* v. *Polak*, [1901] 2 K. B. 385; 70 L. J. K. B. 752.
(*e*) *Rex* v. *Moseley*, 5 East, 224 n.
(*f*) *Re Lloyd*, 3 M. & G. 547.
(*g*) *Re Crowe (an Infant)*, Ir. L. T. Rep. (1883), p. 72.
(*h*) See *Reg.* v. *Nash*, 10 Q. B. D. 454; 52 L. J. Q. B. 442.
(*i*) *Re Kerr (an Infant)*, 24 L. R. Ir. 59.

for the relationship between them forbids that claim, for a bastard has no legal status as a child, even though by repute he may come to have the name of his father, but it is founded on equitable doctrines, and "that sort of blood relationship which, though not legal, gives the natural relations a right to the custody of the child" (*k*). It must be borne in mind that in the case of bastards, as in that of legitimate children, their interests and welfare are the first consideration of the Courts (*l*). Where the parents become married the father is under obligation to support the child, and is *prima facie* entitled to the custody (*m*).

Friendly Societies Act, 1896.—The Legislature has recently gone very far towards recognizing a more than *quasi*-legal relationship between a bastard and his blood connections, for in the Friendly Societies Act, 1896 (*n*), which re-enacts section 8 of the Provident Nominations Act, 1883 (*o*), it provides that if a member of a registered society or branch entitled from the funds thereof to a sum not exceeding £100 is illegitimate and dies intestate without having made any nomination thereof, the trustees may pay the sum of money which that member might have nominated to or among the persons who, in the opinion of the majority of them, would have been entitled thereto if that member had been legitimate. This provision, of course, only affects a limited class of the community, but it demonstrates the direction in which the law is nowadays tending.

Offences Against the Person Act.—The father or mother of a bastard child can maintain a prosecution for decoying or enticing it away under 24 & 25 Vict. c. 100, s. 56 (*p*).

Guardianship.—The parents of bastard children had no legal right to the guardianship of them (*q*). But as a matter of fact, the mother was frequently appointed guardian to her bastard child (*r*). As the Court will not appoint a guardian for an infant who has no property, a putative father will not be appointed guardian of his illegitimate child having no property,

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(*k*) Per Jessel, M.R., in *Reg.* v. *Nash*, 52 L. J. Q. B. 444.
(*l*) *Reg.* v. *Nash* (*ubi sup.*).
(*m*) *Re Gavagan*, [1922] 1 Ir. R. 148.
(*n*) 59 & 60 Vict. c. 25, s. 58. (*o*) 46 & 47 Vict. c. 47.
(*p*) Under this section no person who shall be the mother, or shall claim to be the father of an illegitimate child, shall be liable to be prosecuted on account of getting possession of the child, or taking such child out of the possession of any person having the lawful charge thereof.
(*q*) *Rex* v. *Felton*, 1 Bott. & Const. P. L. 467.
(*r*) Macph. Inf. 555.

unless he makes a settlement upon him, and he has no absolute right, under any circumstances, to claim the guardianship (*s*), whether to take effect during his life, or after death by testamentary appointment (*t*). The mother likewise could not leave testamentary guardians for her bastard children (*u*); and where the putative father suitably provides for them, the person nominated in the mother's will as guardian, though found to be a fit and proper person, was held not entitled to their custody and education as against the father (*x*); and where illegitimate daughters took considerable fortunes under their father's will, the mother applied for the office of guardian, but the Court appointed another person (*y*). Under the Guardianship of Infants Act, 1925, however, if the mother is dead, the person whose consent is required to the marriage of an illegitimate infant is the guardian appointed by the mother, and it may therefore be assumed that section 5, sub-section 2 empowers the mother of an illegitimate child to appoint a person to be guardian after her death.

Custody as Between Parents and Strangers.—As between strangers and the parents of a bastard child, it is now clear law that the latter have a very considerable claim to its custody, control, and education; but under all circumstances the benefit and welfare of the child are kept prominently before the mind of the Court which has to decide the question of the custody. At one time the mother and her illegitimate child were deemed very little more than strangers to one another (*z*); and indeed this theory and assumption have been acted upon; and in one case where a mother had left her bastard child, an infant of a year old, in the charge and custody of friends for seven years, but was desirous of taking her child back into her own custody, Wightman, J., on the application of the mother by *habeas corpus*, refused to give the infant over into her custody, on the ground that neither the father nor the mother had any particular right to the custody of their bastard child (*a*). And in another case where the mother applied by *habeas corpus* for the custody of her illegitimate child, who had attained the age of twelve, and was desirous of remaining with her present

(*s*) Macph. Inf. 110. (*t*) *Sleeman* v. *Wilson*, L. R. 13 Eq. 36.
(*u*) *Ord* v. *Blackett*, 9 Mod. 116.
(*x*) See *Brand* v. *Shaws*, 16 Ct. of Sess. Cas. 315. This was a decision under the Guardianship of Infants Act, 1886.
(*y*) *Curtois* v. *Vincent*, Jac. 268.
(*z*) See remarks of Maule, J., in *Re Lloyd*, 3 M. & G. 547.
(*a*) *Reg.* v. *White*, 10 L. T. (o.s.) 349.

custodians, the Court refused to deliver up the child to her, but allowed the child to make her choice whether she would go to her mother or remain where she was (*b*). The natural tie between the mother and her bastard child has on equitable principles lately had effect given to it; and, subject to the interests and benefit of the child, her right to its control and custody (*c*), and to dictate the character of its education (*d*) is established. As Sir George Jessel said: "In Equity regard was always had to the mother, the putative father, and the relations on the mother's side" (*e*). But this right is not absolute (*f*), or the same as that of a father of a legitimate child (*g*); but as she has statutory liabilities cast upon her in respect of its maintenance so corresponding rights are recognized in her (*h*).

Where the circumstances justify the preference, strangers in blood may be entrusted with the custody in preference to the claim of the maternal grandmother (*i*); although the doctrine that an illegitimate child is *nullius filius*, with its rigorous logical conclusion that no one, not even a near blood relation, has any claim upon it, does not prevail in a Court of equity (*k*).

Maintenance.—At common law the putative father was not compellable to support his bastard child, or contribute in any way to its maintenance. But by an early statute (*l*) the reputed father might be charged with the sustentation of his bastard child for the purpose of relieving the parish in which it was born; and under the general poor-law system of administration he was rendered liable for its support in order to relieve the parish (*m*); but by later legislation his liability is now to afford relief to the mother (*n*). He can be made liable for its support till it reaches the age of sixteen years (*o*). The marriage of the mother no longer frees him from his liability until the period for which he has been ordered to contribute towards its support has expired (*p*) or the child has died (*q*); and the

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(*b*) *Re Lloyd* (*ubi sup.*).

(*c*) *Reg* v. *Nash* (*Rose Carey's Case*), 10 Q. B. D. 454; 52 L. J. Q. B. 442, overruling *Reg.* v. *White* (*ubi sup.*); *Rex* v. *New*, 20 T. L. R. 583.

(*d*) *Rex* v. *New* (*ubi sup.*).

(*e*) *Reg.* v. *Nash* (*ubi sup.*).

(*f*) *Re Ullee*, 54 L. T. 286.

(*g*) *Barnardo* v. *M'Hugh*, [1891] App. Cas. 388.

(*h*) Per Halsbury, C., in *Barnardo* v. *M'Hugh* (*ubi sup.*) at p. 395.

(*i*) *Re Connor*, [1919] 1 Ir. R. 361.

(*k*) *Ibid.*, per O'Connor, M.R., at p. 367.

(*l*) 18 Eliz. c. 3.

(*m*) 4 & 5 Wm. IV. c. 76, s. 72.

(*n*) 7 & 8 Vict. c. 101, s. 5.

(*o*) 35 & 36 Vict. c. 65, s. 5.

(*p*) The latter portion of section 5 of 7 & 8 Vict. c. 101, providing for the cessation of the order on the marriage of the mother is repealed. *Sotheron* v. *Scott*, 6 Q. B. D. 518; 50 L. J. M. C. 56; *Pearson* v. *Heys*, 7 Q. B. D. 260; 50 L. J. M. C. 124.

(*q*) 35 & 36 Vict. c. 65, s. 5.

justices have no power to inquire whether the husband of the mother (if she has married) is or is not able to support the bastard child, but must enforce the order (*r*), and they must do so where the mother is a married woman living apart from her husband, who subsequently returns and resumes cohabitation with her (*s*). It has also been decided that where a bastard child becomes chargeable to a union the guardians may apply for an order of maintenance against the putative father under the Bastardy Laws Amendment Act, 1873 (*t*), though its mother has married and her husband is capable of supporting and maintaining the child (*u*). The father cannot oust the jurisdiction of the magistrates to order him to contribute to the support of the child on the application of the mother for that purpose, by any arrangement with her indemnifying him against any liability in respect of the child (*x*). He may be committed to prison for a term not exceeding three months if he refuse to comply with the order, and no sufficient distress be found on his premises to satisfy the amount due under the order (*y*).

The putative father is not only liable to the mother but also to the union, and the guardians may recover by an order of justices the cost of relief of a bastard child who has become chargeable to the union under certain circumstances; and the payment to be made under such an order is recoverable by the relieving officer or other officer appointed to receive it (*z*). An allowance will be made out of a lunatic's estate for illegitimate children, but not for their mother (*a*).

A father is not liable to support his legitimate children apart from his statutory liability, or unless he contracts to render himself liable, or so acts as to raise an implication of an intention so to render himself liable, though very slight evidence

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(*r*) *Hardy* v. *Atherton*, 7 Q. B. D. 264; 51 L. J. M. C. 105.
(*s*) *Ex parte Grimes*, 22 L. J. M. C. 153; S. C. 17 Jur. 554.
(*t*) 36 & 37 Vict. c. 9, s. 5.
(*u*) *Plymouth Guardians* v. *Gibbs*, [1903] 1 K. B. 177; 72 L. J. K. B. 33. It is by no means sure that this decision is correct; it is based altogether on the word "chargeable" in the section. But under 4 & 5 Wm. IV. c. 76, s. 57, a husband is liable for the support of the children of his wife, whether legitimate or illegitimate; he is primarily liable, and his liability should be first enforced. If he is not of ability to support his wife's bastard child which becomes chargeable, then no doubt the liability of the putative father would arise. In *Hardy* v. *Atherton* (*ubi sup.*) the order against the father had been obtained before the mother married, which fact clearly distinguishes that case from the one under discussion.
(*x*) *Griffith* v. *Evans*, 46 L. T. 417.
(*y*) 35 & 36 Vict. c. 76, s. 4.
(*z*) 36 & 37 Vict. c. 9, s. 5.
(*a*) *Ex parte Haycock*, 5 Russ. 154.

is required to fix him with this liability (*b*). It is equally the case with regard to his bastard children; if he contracts expressly to render himself liable, or so acts that an implication to render himself liable can be raised, he will be held to his bargain. If the father has adopted a bastard child as his own, though no order has been made on him, he is liable for the expenses of nursing and necessaries (*c*); or if he has consented to pay an annual sum for its support, he must continue to do so, or provide for the child at his own expense, or give clear and distinct notice of his intention to discontinue the payment of such annual sum (*d*). Where he has refused to continue its support until the mother obtained an order of affiliation, he will not be liable for the arrears of maintenance (*e*). An agreement between the father and the mother that she is to support the child, and that he will allow her a sum for such support, will be enforced (*f*). It is not, however, the relief of the mother, but the benefit and interests of the child, that the law regards; and a contract by the mother of a bastard child to release the putative father, in consideration of a present money payment, from all further payments in respect of the child, is not void in law; but neither is it a bar to the jurisdiction of the magistrates to make an order of affiliation on the father, such order being, under the statute, for the benefit of the child, and not of the mother exclusively (*g*).

Contract for Maintenance. A contract based upon fornication or illicit cohabitation in the future, whether by deed or simple contract, is void as being *contra bonos mores* (*h*). As regards past cohabitation, the rights of the parties vary as the arrangement was carried out by deed, or by simple contract. If the man contracts by deed he is bound, for the law presumes a consideration; thus, where he covenants to pay an annuity to the woman in consideration of past cohabitation, or gives her a bond to secure to her the payment of money for her support or the support of her children, though such consideration is really no consideration at all, the contract is valid, and an action may

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(*b*) See *ante*, chap. ii. pp. 519 *et seq.*

(*c*) *Hesketh* v. *Gowing*, 5 Esp. 131; see also *Gore* v. *Hawsey*, 3 F. & F. 509.

(*d*) *Cameron* v. *Baker*, 1 C. & P. 268; *Nichole* v. *Allen*, 3 C. & P. 36; and see *Mortimore* v. *Wright*, 6 M. & W. 482.

(*e*) *Furrillio* v. *Crowther*, 7 D. & R. 612.

(*f*) *Souch* v. *Strawbridge*, 2 C. B. 308; *Knowlman* v. *Bluett*, L. R. 9 Ex. 307; 43 L. J. Ex. 29.

(*g*) *Follitt* v. *Koetzow*, 29 L. J. M. C. 128.

(*h*) *Robinson* v. *Cox*, 9 Mod. 263.

be maintained upon it (*i*). A deed in which a man contracts to make provision for a woman with whom he has cohabited, though it provides for the possibility of future cohabitation, is not rendered invalid by the latter provision (*k*). Where the arrangement between the parties is only by simple contract, the man is not bound by his promise; so where in a declaration in *assumpsit*, the woman averred that the defendant had seduced and debauched her, and induced her to cohabit with him, whereby she had been injured in her character and deprived of the means of procuring an honest livelihood; that the two had agreed to discontinue the immoral connection and live apart; and that the defendant, as a compensation for the injury and in consideration of the promises undertook to pay the plaintiff a yearly sum towards her maintenance, which he had failed to do, it was held a bad declaration, as disclosing no legal consideration for the undertaking (*l*). But where there is a child for the mother to support, then an arrangement by simple contract to provide for the maintenance of mother and child will bind the father, because the mother assumes a larger responsibility than is placed upon her by law (*m*).

Liability of Mother for Maintenance.—As in the case of the father, a mother at common law was not responsible for the maintenance of her bastard child, and it is only within recent times (*n*) that the statutory duty has been imposed upon the mother of an illegitimate child, so long as she shall be unmarried or a widow, to maintain such child as a part of her family until such child shall attain the age of sixteen (*o*). Her liability ceases on the marriage of such child, if a female, or, as has already been seen, on her own marriage (*p*), in which case her husband will be bound to maintain such child until it has reached the age of sixteen, or until the death of its mother (*q*). But if the mother has separate estate, and her husband cannot support his family, then her liability to support the illegitimate children revives (*r*). Where the mother of a bastard child dies,

(*i*) *Gibson* v. *Dickie*, 2 M. & S. 463; *Marchioness of Annandale* v. *Harris*, 2 P. Wms. 432.

(*k*) *Re Wootton Isaacson Sanders* v. *Smiles*, 21 L. T. R. 89.

(*l*) *Beaumont* v. *Reeve*, 15 L. J. Q. B. 141.

(*m*) *Smith* v. *Roche*, 28 L. J. C. P. 237: *Hicks* v. *Gregory*, 19 L. J. C. P. 81; *Jennings* v. *Brown*, 12 L. J. Ex. 86; *Crowhurst* v. *Laverack*, 22 L. J. Ex. 57.

(*n*) 4 & 5 Wm. IV. c. 76.

(*o*) Sect. 71.

(*p*) See *ante*, p. 521.

(*q*) 4 & 5 Wm. IV. c. 76, s. 57. There is no corresponding liability on the part of the wife to support her husband's illegitimate child.

(*r*) 45 & 46 Vict. c. 75, s. 21.

there is no obligation on her personal representatives to expend the money or property which belonged to her in the maintenance of such child, the liability of the mother being purely personal (*s*). The statutory liability was imposed upon her to prevent the cost of support and maintenance of bastards falling upon the rates, but the statutes in no way impose that liability upon her estate.

Settlement of Child.—As the mother is bound to support her bastard child, it necessarily follows that so far as the working of the poor laws is concerned, they should be inseparable, and she confers her parochial settlement on her child until it acquires a new settlement for itself, which it cannot do (unless a female and marries) until it reaches the age of sixteen (*t*); but the mother's settlement must not be a derivative one; in which case the child takes its birth settlement (*u*). But under the Divided Parishes Act, 1876, when an illegitimate child has reached the age of sixteen or period of emancipation, for the purpose of acquiring a settlement it can add to the period of irremovability over sixteen the necessary period for irremovability under sixteen (*x*); and, indeed, after a full three years' residence with the mother before reaching the age of sixteen under such circumstances as to confer a status of irremovability the pauper bastard will acquire a settlement for himself (*y*).

How Father's Liability Enforced.—The mother may, under certain circumstances, call upon the man whom she alleges to be the father of her bastard child to support it; thus, it is provided that

" any single woman who may be with child, or who may be delivered of a bastard child after the passing of this Act, may either before the birth or at any time within twelve months from the birth of such child, or at any time thereafter, upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance, or at any time within the twelve months next after the return of the man to England alleged to be the father of such child, upon proof that he ceased to reside in England within the twelve months next after the birth of such child, make application to any one

(*s*) *Ruttinger* v. *Temple*, 33 L. J. Q. B. 1.

(*t*) 39 & 40 Vict. c. 61, s. 35; *Overseers of Manchester* v. *Guardians of Ormskirk Union*, 24 Q. B. D. 678; 59 L. J. M. C. 103; *Guardians of Woolwich Union* v. *Fulham Guardians*, [1905] 2 K. B. 203; 74 L. J. K. B. 556.

(*u*) *Guardians of Northwich Union* v. *Guardians of St. Pancras Union*, 22 Q. B. D. 164; 58 L. J. Q. B. 73.

(*x*) *Reg.* v. *Elvet*, 29 L. J. M. C. 17; *Guardians of Highworth and Swindon Union* v. *Guardians of Westbury-on-Severn Union*, 14 App. Cas. 465; 59 L. J. Q. B. 29.

(*y*) *Guardians of West Ham Union* v. *Guardians of Holbeach Union*, [1905] A. C. 450; 74 L. J. K. B. 868.

justice of the peace acting for the petty sessional division of the county, or for the city, borough, or place in which she may reside, for a summons to be issued on the man alleged by her to be the father of the child . . . and the justice shall thereupon issue his summons to the person alleged to be the father" (*z*).

The payment by the putative father on an order obtained by guardians for the support of the child is not the same as an order obtained by the mother so as to entitle her to rely on the payment as having been made to her by the putative father (*a*). The evidence of the mother as to the man summoned being the putative father of her child must be corroborated in some material particular (*b*).

Mere opportunity afforded by common employment is not corroboration (*c*); or that a bachelor allowed the mother to remain in his house for five weeks after the birth (*d*); the opportunity must be accompanied by circumstances of suspicion such as the utterance of falsehoods by the respondent (*e*). Proof of connection subsequent to the date of conception may be corroboration especially if the connection is falsely denied (*f*).

The summons must be personally served on the alleged putative father, or left at his last place of abode; and place of abode is a question of fact for the justices to determine (*g*). If the putative father is out of the jurisdiction, the summons may be left at his last place of abode out of England, if he possesses one (*h*); but if he does not possess a fixed place of abode abroad, service at his last place of abode in England is sufficient (*i*). The jurisdiction of the justices to hear the summons is not ousted by the fact that the alleged father ceased to reside in England before the child was born, and remained out of the country more than twelve months after the birth (*k*). But where he is domiciled out of the jurisdiction, the service of a summons on him abroad will not give the justices in England jurisdiction to make an order on him (*l*).

(*z*) 35 & 36 Vict. c. 65, s. 3. (*a*) *Billington* v. *Cyples*, 52 L. T. 854.
(*b*) 35 & 36 Vict. c. 65, s. 4; and see *Reg.* v. *Pearcey*, 21 L. J. M. C. 129; 17 Q. B. 902.
(*c*) *Burbury* v. *Jackson*, [1917] 1 K. B. 16: 86 L. J. K. B. 255.
(*d*) *Thomas* v. *Jones*, [1921] 1 K. B. 22; 90 L. J. K. B. 49.
(*e*) *Dawson* v. *M'Kenzie*, [1908] S. C. 648; *M'Whirter* v. *Lynch*, [1908] 46 Sc. L. R. 83. (*f*) *Florence* v. *Smith*, [1913] S. C. 978.
(*g*) See *Reg.* v. *Lee*, 58 L. T. 384; *Reg.* v. *Winton and others*, 59 L. T 382; *Reg.* v. *Farmer and another*, [1892] 1 Q. B. 637; 61 L. J. M. C. 120.
(*h*) *Reg.* v. *Farmer* (*ubi sup.*).
(*i*) *Reg.* v. *Webb and others*, [1896] 1 Q. B. 487; 65 L. J. M. C. 98.
(*k*) *Reg.* v. *Evans*, [1896] 1 Q. B. 228; 65 L. J. M. C. 29.
(*l*) *Berkley* v. *Thompson*, 10 A. C. 45; 74 L. J. K. B. 868. Under 44 & 45 Vict. c. 24, s. 6, an English woman alleging that a person ordinarily residing

The term "single woman" includes a widow (*m*), also a married woman living apart from her husband (*n*); but the application for relief cannot be made by a married woman living with her husband, and supported by him (*o*), even though the summons was taken out against the putative father before her marriage, and she was prevented from serving it by his default (*p*). A mere colourable separation from the husband for the purpose of founding the jurisdiction of the justices is insufficient (*q*).

Amount Awarded for Maintenance.—The justices in petty sessions may make an order on the putative father for the maintenance and education of the child as they may think fit, and enforce the order by distress and commitment (*r*). The sum of 5s. mentioned in the Act of 1872 (*s*) was increased by the Affiliation Orders (Increase of Maximum Payment) Act, 1918 (*t*), to 10s. a week with power to apply to increase the amount under existing orders, and collecting officers were empowered to give notice to persons interested of their right to apply for an increase, and on receiving authority might apply in the name of the person entitled. The Bastardy Act, 1923 (*u*), enacted that for pending applications and future applications the sum of 20s. is to be treated as substituted for 10s. Where an order has been obtained at the instance of guardians (*x*) the guardians or any person having the custody of the child for the time being may apply for an order varying the former order. Any person under an obligation to make payments must give notice of change of address under penalty of 40s. (*y*). No such order shall be in force except for the purpose of recovering money previously due under such order, after the child in respect of whom it was made has attained the age of thirteen years, or after the death of the child; though the justices have a discretionary power

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in Scotland is the father of her bastard child may have recourse to the Scottish Courts; and *vice versa* in the case of a Scottish woman and an alleged English putative father. See *Berkley* v. *Thompson* (*ubi sup.*).

(*m*) *Reg.* v. *Wymondham*, 2 Q. B. 54.

(*n*) *Reg.* v. *Collingwood*, 17 L. J. M. C. 138; *Stacey* v. *Lintell*, 4 Q. B. D. 291; 48 L. J. M. C. 108

(*o*) *Stacey* v. *Lintell* (*ubi sup.*).

(*p*) *Tozer* v. *Lake*, 4 C. P. D. 322. See also *Lang* v. *Spicer*, 1 M. & W. 129.

(*q*) *Jones* v. *Davies*, [1901] 1 Q. B. 118; 70 L. J. Q. B. 38.

(*r*) 35 & 36 Vict. c. 65, s. 4.

(*s*) 35 & 36 Vict. c. 65.

(*t*) 8 & 9 Geo. V. c. 49.

(*u*) 13 & 14 Geo. V. c. 23.

(*x*) *Ibid.*, s. 3.

(*y*) *Ibid.*, s. 4.

to enlarge its operation until the child reaches the age of sixteen (*z*).

Right of Appeal.—The father has the right of appeal to quarter sessions against the order of the justices (*a*). The mother had formerly no right of appeal if her application was refused, but by the Criminal Justice Administration Act, 1914 (*b*), she is given a right of appeal, and this Act has not abolished her right to make a further application (*c*). She may make any number of applications within the statutory period; and dismissal of the summons for non-appearance or want of corroboration being in the nature of a non-suit is not a bar to a further application made within time (*d*); though a previous dismissal on the merits should be taken into serious consideration by the justices on any subsequent application. The father may appeal subject to entering into recognizances, of which he must give notice to the mother, but in the event of her death intervening the performance of this condition is excused as having been prevented by the act of God, and the Court of sessions must proceed to hear the appeal (*e*). If the father appeals to quarter sessions against the bastardy order, and the Court quashes it, their decision is one on the merits, and is final, and the mother cannot take fresh proceedings before justices in petty sessions (*f*). An adjudication on the merits has been held not to be a judgment *in rem* so far as the paternity of the bastard child is concerned, and may be questioned in an action for seduction of the mother by one who has been damnified by the loss of services (*g*). The appeal by the father is a rehearing, and the respondent must begin her case as she did before the justices. The notice of appeal must state the general grounds of appeal (*h*). When the application is made within the twelve

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(*z*) *Ibid.*, s. 5.
(*a*) 7 & 8 Vict. c. 101, s. 4.
(*b*) 4 & 5 Geo. V. c. 58, s. 37 (2).
(*c*) *McGregor* v. *Telford*, [1915] 3 K. B. 237; 84 L. J. K. B. 1902.
(*d*) *Reg.* v. *Machen*, 18 L. J. M. C. 213; *Reg.* v. *Gaunt*, L. R. 2 Q. B. 466; *Reg.* v. *Hall and Gillespie*, 57 L. T. 306; and see *Reg.* v. *Robinson*, [1898] 1 Q. B. 734; 67 L. J. Q. B. 510. In this case the mother obtained an affiliation summons against the putative father and subsequently made three applications for a summons to three different justices, which were not served owing to the inability of the applicant to find the defendant; it was held that these three applications must be treated as one application, and as exhausted by the hearing and dismissal of the summons on a subsequent date. See also *Rex* v. *Seddon*, *Ex parte Hall*, 85 L. J. K. B. 806.
(*e*) *Reg.* v. *Leeds Recorder*, 21 L. J. M. C. 171.
(*f*) *Reg.* v. *Glynne*, L. R. 7 Q. B. 16; 41 L. J. M. C. 58.
(*g*) *Anderson* v. *Collinson*, [1901] 2 K. B. 107; 70 L. J. K. B. 620.
(*h*) *Reg.* v. *Shingler*, 17 Q. B. D. 49; 55 L. J. M. C. 147.

months, it is not necessary that the summons upon it should issue at the same time (*i*).

Bastard Born Abroad.—Where a bastard is born abroad, and of a foreign mother, the justices cannot make an order on the putative father to contribute to its support and maintenance (*k*); but they have jurisdiction to make an order where the child is born in England, though begotten in a foreign country (*l*); and if the child is born on an English ship on the high seas, it is the same as if the child had been born in England (*m*).

Determination of Liability.—The liability of the father is purely personal, and on the death of the father the mother cannot recover arrears against his estate (*n*). Where an agreement was made between the father and the mother to pay a weekly sum until the child attained fourteen years of age, and in consideration of the payments the mother agreed not to apply for a bastardy order and to maintain and bring up the child, and on the death of the mother before the child attained the stipulated age the father stopped payment, it was held in an action by the maternal grandfather as administrator of the mother that the father's obligation came to an end with the death (*o*).

Domicil of Origin.—The domicil of origin of a bastard child is that of its mother at the time of its birth (*p*). If the mother acquires a different domicil to that which she had at the time of the birth, her illegitimate offspring will derive the new domicil from her.

(*i*) *Potts* v. *Cambridge*, 27 L. J. M. C. 62.

(*k*) *Reg.* v. *Blane*, 28 L. J. M. C. 216.

(*l*) *Hampton* v. *Rickard*, 43 L. J. M. C. 133.

(*m*) *Marshall* v. *Murgatroyd*, L. R. 6 Q. B. 31; 40 L. J. M. C. 7. From this it would follow that if a bastard child were born on a Scottish or Irish ship, though the vessel were *British*, the justices in *England* would not have jurisdiction.

(*n*) *Re Harrington*, *Wilder* v. *Turner*, [1908] 2 Ch. 687.

(*o*) *James* v. *Morgan*, [1909] 1 K. B. 564; 78 L. J. K. B. 471.

(*p*) Mr. Dicey is of opinion (Dom. 102) that the domicil of the illegitimate infant is not changed by the marriage of its mother, so that its domicil should follow that of its step-father. But this view is open to the remark that, as by English law the husband is liable for the support of his wife's illegitimate children born before the marriage, the child would become one of her husband's family; and as its rights and those of the step-father in respect of property could not be in any way affected, the power of conferring a new domicil may exist in the step-father.

PART III.

GUARDIAN AND WARD.

CHAPTER I.

NATURE OF THE OFFICE OF GUARDIAN.

An infant, by reason of his tender years, is weak, is open to the attacks of those who would take advantage of his weakness, and so needs protection. When the parents of the infant are living, they afford the necessary protection for their offspring. But should the parents be dead, or unfitted for their duties, then the law either appoints guardians to protect the infant's person and property, or permits them to be chosen. For these reasons a guardian has been styled a "temporary parent" (*a*).

In English law the guardian performs the double office of educating and protecting the person of the ward, and of managing his affairs and property until he attains majority.

Parent and Guardian Compared.—The relation of parent and child has been said to be that of guardian and ward, because it is the duty of a parent to protect and shelter his child, and to rear it in a manner which becomes one who is intrusted with a great responsibility. This is rather the moral than the legal aspect of the question, for on comparing the law of parent and child with that of guardian and ward, it will be seen that the powers and authority of the parent are far wider and larger, and less subject to judicial control than those of the guardian; though on the other hand the liabilities of the guardian are in some respects less than those of the parent. Thus, "the parent must support his child from his own means; and in return the child's labour and services belong to him. But the guardian is not bound to supply the wants of his ward, except from the

(*a*) Bl. Com. 460.

ward's own estate in his hands and the liberality of others, though it were to keep the child from starving. On the other hand, the guardian has no more right to the labour and services of his ward than any stranger" (*b*). Again, there is no power to prevent a father from encouraging his child to contract an unequal marriage, while a guardian would be prevented from marrying his ward into an inferior social station; and the grounds for removing a ward out of the care and custody of his guardian would be in many cases insufficient to warrant the interference of the Court to remove a child out of the custody of the father.

Guardian of Person and of Estate.—The natural division of guardians is into guardians of the person and guardians of the estate. Where a guardian is assigned to the person of the ward, the relation between the two is most like that of parent and child. The guardian appointed to the estate bears a close resemblance to a trustee appointed in the ordinary way for the purpose of managing an estate and executing certain trusts in connection with it. But very frequently the same individual is the guardian of the person and the estate; thus, a guardian appointed by will is, unless there is an express provision to the contrary, guardian both of the person and the estate (*c*); and the Court of Chancery, where there is no suit or action pending before it, will appoint a guardian both for the person and the estate. But the Court, on the contrary, where a suit is pending, appoints a guardian for the person only, the estate being under the direction of the Court; and it often appoints guardians for special purposes connected with the ward's property or person (*d*).

Guardianship a Trust.—It seems agreed by all writers on this subject that the relationship between guardian and ward is one *uberrimæ fidei*, not only while it lasts, but even after it has ceased to exist (*e*). During its existence the parties are under a general disability to deal with each other; and this disqualification proceeds obviously from the necessity of protecting the ward. But even after the ward has attained majority, any transactions between them in the settling of their accounts or delivery up of the trust, if to the advantage of the guardian, will be regarded with suspicion if they have been

(*b*) Sch. Dom. Rel. s. 320.
(*c*) *Bedell* v. *Constable*, Vaugh. 177.
(*d*) Macph. Inf. 114; and see *post*, chap. ii. p. 632.
(*e*) *Taylor* v. *Johnston*, 19 Ch. D. 603; 51 L. J. Ch. 879.

entered into but a short time after the termination of the relationship, unless ample deliberation on the part of the ward, and the utmost good faith on the part of the guardian, are clearly demonstrated (*f*). The Court is suspicious of undue influence, and though the office may be legally at an end, yet its moral effects may not have worn awy (*g*), for a gift which might seemingly be the act of a generous and grateful heart may really proceed from the impulse of a mind misled by undue kindness or forced by oppression (*h*). "The relation of guardian and ward is strictly that of trustee and *cestui que trust*. It is a peculiar relation of trusteeship. . . . A guardian is not only a trustee of the property, as in an ordinary case of trustee, but he is also the guardian of the person of the infant, with many duties to perform, such as to see to his maintenance and education" (*i*). Guardians are but trustees, and guardianship of the person of an infant is a more exacting species of trusteeship than the mere trust to hold and dispose of his property (*k*). "It is not to be disputed that if a person appointed guardian in that character possesses himself of any of his ward's property, of that property he becomes a trustee, although he is only a trustee by construction and not appointed by name" (*l*). Joint guardians may sue together on account of any joint transaction founded on their relation to the ward, even after the relation ceases. Also, the receipt of one is the receipt of all. One guardian could maintain trespass against the other for forcibly removing the child against his wishes, as one of two joint trustees could not act in defiance of the other (*m*); but now under the Guardianship of Infants Act, 1925, where the guardians are unable to agree on any question affecting the welfare of the infant they, or either of them, may apply to the Court for its direction (*n*); and where one guardian consents to his co-guardian's misapplication of funds he is liable (*o*). Where a person puts himself *in loco parentis* and manages the infant's property he must do so accurately and with complete fairness; and if the account settled between the guardian and

(*f*) 1 Story, Eq. s. 317; *Dawson* v. *Massey*, 1 B. & B. 226.
(*g*) *Wedderburn* v. *Wedderburn*, 4 Myl. & Cr. 41.
(*h*) *Hylton* v. *Hylton*, 2 Ves. 548; *Hatch* v. *Hatch*, 9 Ves. 297.
(*i*) Per Lord Romilly, *Mathew* v. *Brise*, 14 Beav. 341, 345.
(*k*) *Duke of Beaufort* v. *Berty*, 1 P. Wms. 703.
(*l*) *Sleeman* v. *Wilson*, L. R. 13 Eq. 36. See also *Revett* v. *Hervey*, 1 Sim. & St. 502; 2 L. J. Ch. 39.
(*m*) *Gilbert* v. *Schwenck*, 14 M. & W. 488.
(*n*) 15 & 16 Geo. V. c. 45, s. 6.
(*o*) Sch. Dom. Rel. s. 322.

the ward on the latter attaining his majority is found to be false and fraudulent, such account, even after a long period of time, will be set aside, and the accounts will be directed to be taken with special inquiries (*p*).

From the doctrine that a guardian is a trustee, it follows that his "trust is one of obligation and duty, and not one of speculation and profit. He cannot reap any benefit from the use of his ward's money. He cannot act for his own benefit in any contract or purchase, or sale as to the subject of the trust. If he settles a debt upon beneficial terms, or purchases it at a discount, the advantage is to accrue entirely to the infant's benefit. Every guardian . . . is bound to keep safely the real and personal estate of his ward, and to account for the personal estate, and the issues and profits of the real estate. . . . If he has been guilty of negligence in the keeping or disposition of the infant's money, whereby the estate has incurred loss, he will be obliged to sustain that loss" (*q*), on the principle that all persons acting in a fiduciary character are bound to use the same care and management that a prudent man would exercise in the conduct of his own affairs. Wherever a fiduciary relation is established between the parties, the trustee must act in the most open and faithful manner, and seek no personal profit from his position (*r*).

(*p*) *Allfrey* v. *Allfrey*, 17 L. J. Ch. 30; see also *Coleman* v. *Mellersh*, 2 M. & G. 309.

(*q*) 2 Kent, Com. s. 229.

(*r*) See *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218; 48 L. J. Ch. 73.

CHAPTER II.

THE DIFFERENT KINDS OF GUARDIANS, AND THE METHODS OF APPOINTING THEM.

From time to time there have been many species of guardianship, some of which are abolished, others have fallen into desuetude, without being actually abolished, and others are nowadays resorted to but very rarely. Guardians derive their authority either from the law, or a custom recognized by the law, or a special appointment; that is to say, certain persons are designated and marked out by the law to fulfil the office, or are specially appointed for that purpose, either (1) by the father of the infant; (2) by the infant himself; or (3) by a Court of competent jurisdiction. This chapter will deal with the different kinds of guardianships most in use.

(1) Guardians by authority of the law.
  (a) By nature and nurture.
  (b) By 4 & 5 Ph. & M. c. 8.
  (c) In socage.
(2) Guardians by custom.
(3) Guardians by special appointment.
  (a) Testamentary guardians under 12 Car. II. c. 24, 49 & 50 Vict. c. 27, and 15 & 16 Geo. V. c. 45.
  (b) By election of the infant.
  (c) By a Court of competent jurisdiction.
    (i) By Court of Probate, guardians *durante minore ætate*.
    (ii) By Court of Chancery.
(4) Foreign guardians.
(5) Guardians appointed for special purposes under different statutes.

(1) *Guardians by Authority of the Law.*

(a) Guardians by Nature and Nurture. The Father.—"The father is entitled to the custody of his own children during their infancy, not only as guardian by nurture but by

nature" (*a*); and it is "the legal natural right of the father to have the custody of the child" (*b*). It is a guardianship pointed out by nature, and belongs exclusively to the parents. The right of the father, except as limited by statute and the control of the Courts, was absolute even against the mother (*c*), though the child were an infant at the breast (*d*).

The Mother.—The mother had no absolute right to be the guardian of her children, but where no other was appointed, she was chosen as being properly so by nature and nurture (*e*); but on the death of the father she became the sole legal guardian of her children if the father had not appointed a guardian, and joint legal guardian if a guardian had been appointed by her husband (*f*). Her guardianship, if not superseded by the appointment of a new guardian by the Court, is the proper and legitimate custody till the infant attains twenty-one (*g*). According to the older law, neither the putative father nor the mother of an illegitimate child had the legal right of guardianship (*h*); but the tendency of the modern law is to recognize the mother not only as the natural but the legal guardian of her bastard child (*i*), and entitled to its custody unless there are very strong reasons for displacing her right; so that she may sue out a writ of *habeas corpus* for the recovery of its person from strangers into whose custody she had delivered it, and if her choice of a home would be beneficial to the interests of the child, the Court will order it to be delivered up in order that it may go to such new home (*k*); but this right of the mother is not absolute (*l*).

Duration of Office of Guardian.—The office of natural guardian lasted until the child attained majority, while the guardianship for nurture terminated on the infant reaching fourteen (*m*). The natural guardian was concerned only with the person of the infant, and could not intermeddle with its

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(*a*) *Ex parte Hopkins*, 3 P. Wms. 152. See also *Stileman* v. *Ashdown*, 2 Atk. 477; *Wellesley* v. *Duke of Beaufort*, 2 Russ. & M. 639; 1 Bl. Com. 461.

(*b*) *De Manneville* v. *De Manneville*, 10 Ves. 52.

(*c*) *Ex parte Glover*, 4 Dowl. 291. His power and control are not affected by his absence abroad. *Re Emily Suttor*, 2 F. & F. 267.

(*d*) *Re Thomas*, 22 L. J. Ch. 1075.

(*e*) *Villareal* v. *Mellish*, 2 Swanst. 533; S.C. 2 Atk. 14.

(*f*) 49 & 50 Vict. c. 27, s. 2.

(*g*) *Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. 103.

(*h*) *Reg.* v. *Nash* (*Re Carey*), 10 Q. B. D. 454; 52 L. J. Q. B. 442.

(*i*) *Re Darcys* (*Infants*), 11 Ir. C. L. 298.

(*k*) *Reg.* v. *Nash* (*Re Carey*) (*ubi sup.*).

(*l*) *Re Ullee*, 54 L. T. 286.

(*m*) *Harg.* n. 12, Co. Litt. 88 b.

property (*n*). Though a parent is guardian of the child's property at common law, and must account to him for the rents and profits of it as a bailiff (*o*), he is only a *quasi*-guardian until he has been appointed by the Court, in which case he gives security, and is altogether under the control of the Court, as any other guardian of the estate would be (*p*).

(b) Guardians by 4 & 5 Ph. & M. c. 8.—This statute, which was repealed by 9 Geo. IV. c. 31, which in its turn was repealed by the Offences Against the Person Act, 1861 (*q*), survives in the fifty-fifth section of the latter Act, which is directed against the forcible abduction of girls under the age of sixteen.

It has been held that the effect of these statutes has been to extend the right of the father or mother to recover the custody of the person of a female child by *habeas corpus* or otherwise, to the age of sixteen. But the truer view would seem to be that they were directed rather to the deterrence from the commission of the offence, and the prevention of an irremediable mischief, by the punishment of those who forcibly abducted girls of a tender age, whether for the purpose of marriage or prostitution; for without the aid of the statute the parental right could be enforced by *habeas corpus* though the wrong-doer would escape all punishment for his act.

Age of Choice by Children.—The parents have as much right to the control and custody of their daughter of seventeen (and even up to twenty-one (*r*)) as to one of fifteen, and may enforce it by the remedy of *habeas corpus*, with this qualification, that on arriving at the age of sixteen, the law presumes that she can exercise a discretion whether she shall return to her parents or not (*s*), but such choice must be a wise one, and in her own interests (*t*).

In the case of boys, the age at which the law presumes they can exercise a discretion as to whether they shall return to their parent's control or not has been put at fourteen (*u*); but in their case also, it is submitted, their choice must be wisely

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(*n*) *Ex parte Bond*, 8 L. T. 252.
(*o*) *Wall* v. *Stanwick*, 34 Ch. D. 763; 56 L. J. Ch. 501.
(*p*) These matters are dealt with in fuller detail elsewhere: Parent and Child, chap. iii.
(*q*) 24 & 25 Vict. c. 100.
(*r*) See *Re Agar-Ellis, Agar-Ellis* v. *Lascelles*, 24 Ch. D. 317; 53 L. J. Ch. 10.
(*s*) *Reg.* v. *Howes*, 30 L. J. M. C. 47; S. C. 3 L. T. 467.
(*t*) *Reg.* v. *Clarke*, 26 L. J. Q. B. 169.
(*u*) See *ante*, Pt. II., Parent and Child, chap. ii. p. 488.

made. The Divorce Court has jurisdiction to regulate the custody of children until they attain majority (*x*).

(c) Guardians in Socage.—This was once an important species of guardianship, but owing to the more extended supervision of the Court of Chancery over the persons and fortunes of infants, it has fallen into disuse. It is a common law guardianship, and it can only arise in the case of a legal and not merely equitable estate (*y*), and where the infant under the age of fourteen takes the land by descent (*z*). The duty of the guardian was to instruct the ward in the art of agriculture, and to insure the safety of his person and land, and the guardian could not dispose of his interest by alienation, succession, or devise (*a*). In order to secure this safety of the ward's person and lands, the guardianship in socage falls to the lot of the next of blood to whom the inheritance cannot descend (*b*); thus, if the lands descend on the paternal side, the nearest relation by blood on the mother's side will be the guardian in socage. Blackstone (*c*) gives as a reason for this choice that "the law judges it improper to trust the person of an infant in his hands who may by possibility become heir to him, that there may be no temptation, nor even suspicion of temptation, for him to abuse his trust," and adopts the language of Coke and Fortescue that the opposite theory of the Roman law was "*quasi agnum committere lupo, ad devorandum.*"

It is the duty of the guardian to take possession of the heir's person, and of the lands and tenements which he has by descent, and also hereditaments not lying in tenure, as rent-charges, rents-seck, common of pasture, and the like; also to receive the rents and profits for the heir until the latter reaches the age of fourteen, to keep his evidences of title safely, and to bring him up well (*d*). He is also bound to do all the services incident to the land on behalf of the infant, as to repair a bridge, if the land is liable to that burden (*e*). He ought to keep down the interest on incumbrances, though the infant may be entitled in fee (*f*). In order to carry out his duty towards the ward, an

(*x*) *Thomasset* v. *Thomasset*, [1894] P. 295; 63 L. J. P. 140.
(*y*) *Rex* v. *Toddington*, 1 B. & Ald. 560. Nor, it would seem, when the interest is only reversionary. Macph. Inf. 20.
(*z*) *Quadring* v. *Downs*, 2 Mod. 176.
(*a*) Co. Litt. 88 b; *Bedell* v. *Constable*, Vaugh. 177.
(*b*) *Ibid.*
(*c*) 1 Com. 461.
(*d*) Co. Litt. 87, b, 88 a, 89, 123.
(*e*) *Rex* v. *Sutton*, 3 A. & E. 597; 4 L. J. K. B. 215.
(*f*) *Sergeson* v. *Sealey*, 2 Atk. 412; S. C. *Sergeson* v. *Cruise*, 1 Ves. Sen. 477.

actual estate and interest in the land is given to him (though not to his own use), so that a settlement may be gained by residence on the land (*g*). He may grant leases in his own name till the ward reaches fourteen (*h*); he can surrender a lease for a renewal (*i*); and can practically accept a surrender (*k*); he may also pay off the principal of a mortgage (*l*). In virtue of his legal possession of the land, he can grant copyholds in his own name, and make admittances; bring actions for trespass or ejectment, or distrain for damage feasant (*m*); but he cannot present to a benefice in right of the ward, for, as he can make no profit out of it, he cannot be accountable in respect of it (*n*).

This kind of guardianship ends when the infant reaches the age of fourteen, or the guardian has been superseded by some other guardian, and at the close of his office the guardian must give an account of his trust (*o*), and for this reason an infant cannot be guardian in socage (*p*). "The power of a guardian in socage is gone by the taking of a husband by the infant, yet they shall have account against the guardian if he continue after" (*q*).

(2) Guardians by Custom.

The various special kinds of customary guardianships have either been abrogated by statute, or have fallen into disuse, or are but very rarely put in force, because the wider and more effectual guardianship of the Court of Chancery, or by the will of the infant's parents, has taken their place. There are three kinds, which it is necessary shortly to describe.

(a) Guardianship by the Custom of the City of London.—The right of the Mayor and Aldermen of the City of London to the guardianship of orphans, though still authorized by law, is fallen into comparative desuetude. When any man or woman free of the City of London dies leaving children within age, by the custom of London, the Mayor and Alderman, in their

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(*g*) *Rex* v. *Oakley*, 10 East, 491.
(*h*) *Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. 103.
(*i*) *Mason* v. *Day*, Prec. Ch 319.
(*k*) *Willis* v. *Whitewood*, Bac. Abr. Gard. (G).
(*l*) *Palmes* v. *Danby*, Prec. Ch. 137
(*m*) See *Rex* v. *Oakley* (*ubi sup.*); *Rex* v. *Sutton* (*ubi sup.*).
(*n*) Co. Litt. 17 b, 89 a.
(*o*) Co. Litt. 88 b.
(*p*) See *Oliver* v. *Woodroffe*, 4 M. & W. 650, and Co. Litt. 88 b.
(*q*) Fitz. Nat. Brev. 118 B. See *Wall* v. *Stanwick*, 34 Ch. D. 763; 56 L. J. Ch. 501.

Court of Orphans, have the custody of the persons, lands, and chattels of such orphans; in the case of males, till the age of twenty-one; in the case of females, till eighteen or marriage. After the death of a freeman, the Mayor and Aldermen may summon his widow or executor to appear at their Court, and give security to exhibit an inventory of his estate. The Chamberlain of London is by custom a corporation sole for this special purpose, and is able to take a bond or recognizance to him and his successors (*r*). The Court of Orphans may exercise the guardianship itself, or may commit it to any other person (*s*). It would seem that the guardianship extends to lands lying out of London belonging to infants who are City orphans (*t*), although the custom of London does not affect the succession to real estate (*u*). The consent of the Court ought to be obtained before the marriage of any City orphan, during the guardianship, and the licence is usually accompanied by a reference to the Common Serjeant to approve of a settlement on the marriage (*x*). The Court of Orphans or their committee may have a writ of ravishment of ward; and if anyone takes an orphan out of their custody, he may be imprisoned till he produces the infant or is delivered by due course of law; and there is no privilege of peerage in such a case (*y*).

(b) Guardianship by the Custom of Gavelkind (*z*).—If a tenant in gavelkind dies, leaving his heir or heirs within the age of fifteen, the next of blood, to whom the inheritance cannot descend, shall (by the appointment of the lord, if there be several in equal degree of kindred) have the custody of the body, lands, and goods of such infant heir until he attains that age, which is still the full age by the custom of Kent. The lord can take nothing by the appointment, nor could he at any time tender marriage to the heir. When the heir arrives at the age of fifteen, he may claim his lands and goods with the improvements; he has the common law action of account against his guardian (*a*); or where the guardian has been appointed by

(*r*) *Fulwood's Case*, 4 Rep. 64 b.
(*s*) *Wilkinson* v. *Miles*, 1 Sid. 250.
(*t*) *Ibid.*
(*u*) See *Babington* v. *Greenwood*, 1 P. Wms. 531.
(*x*) *Frederick* v. *Frederick*, 1 P. Wms. 710.
(*y*) Macph. Inf. 51.
(*z*) The customary tenure of gavelkind is abolished by the Administration of Estates Act, 1925, c. 23, s. 45 (1) a, and the only importance of this paragraph is in connection with the validity of acts done before January 1, 1926, the date of commencement of the Act.
(*a*) But see *post*, chap. vii.

the lord, the heir may come to the lord's Court and demand his inheritance and the mesne profits of the land; and the lord must cause his land to be delivered to him, and distrain the guardian to yield his account. The guardian should be charged and have allowances as guardian in socage at common law; and if he be found in arrear, the lord must levy of him the arrears by distress. This custom of compelling an account by distress extends to him who is actually guardian, whether by right or not. But if the guardian to whom the lord has committed the custody is insolvent, the lord or his heirs are chargeable with the deficiency; and therefore, in practice, the lord seldom interferes, but guardianship takes place as guardianship in socage does at common law, except that it lasts till fifteen, and extends to personal estate (*b*).

(c) By the Custom of the Manor.—If a copyholder (*c*) dies, leaving his heir within the age at which, by the custom of the manor, he is to be out of ward, then, unless there be a special custom to the contrary, the lord is obliged to admit the infant by the next of kin to whom the land cannot descend, who is thereupon constituted guardian. The rules of succession within manors usually correspond with the general law of inheritance; and, therefore, this next of kin is commonly the same person who would be guardian in socage (*d*). If the infant have lands in socage and the rules of descent in the manor differ from those at common law, the two guardianships will not be united in the same person; and in that case the guardian in socage is entitled to the custody of the person, the lord's right being merely to have someone to perform the services in respect of the copyhold or customary lands. In some manors there is a special custom for the lord to appoint a guardian, but this custom must be proved, as the lord cannot have it in the absence of special custom (*e*). Where this special custom exists, the father cannot appoint a guardian in respect to those lands under the statute of 12 Car. II. c. 24 (*f*). But where there is no such special custom, the father, it has been contended, may validly appoint a guardian under the statute (*g*); and there does not

(*b*) Macph. Inf. 45.
(*c*) All copyholds are enfranchised by the Law of Property Act, 1922, c. 16, as from December 25, 1925, and this subject is only retained in reference to questions arising as to events before that date.
(*d*) Macph. Inf. 45.
(*e*) *Drury* v. *Fitch*, Hutt. 17.
(*f*) *Church* v. *Cudmore*, Lutw. 1187.
(*g*) See 2 Watk. Copy. 104, 105.

seem to be any reason why, even in the event of a special custom, he should not be able to appoint a guardian of the person though he cannot affect the copyhold property (*h*). This would apply equally to the mother under the Guardianship of Infants Acts, 1886, and 1925.

The old law as to the time and manner of admitting guardians to copyhold land on behalf of infants, as to the recovery of fines from infants, and as to the forfeiture of their estates, was complicated and vexatious. It was greatly improved by the statute 9 Geo. I. c. 29; that statute was in turn repealed by 11 Geo. IV. and 1 Wm. IV. c. 65; of which the following are the chief provisions: Where any person under the age of twenty-one years is or shall be entitled by descent or surrender to the use of a last will, or otherwise to be admitted tenant of any copyhold lands, such person may appear and be admitted by his guardian or attorney (*i*). An infant may by writing under his hand and seal appoint an attorney for this purpose (*k*). In default of appearance the lord may, after three Courts have been held and proclamations made, at a subsequent Court, appoint a fit person to be attorney, and admit the infant by him, and upon such admittance set and impose the proper fine (*l*). Upon every such admittance of an infant the fine may be demanded by the bailiff or agent of the lord by a note in writing, signed by the lord of the manor or his steward, to be left with the guardian of the infant, or with the infant if he have no guardian, or with the tenant or occupier of the land to which the infant has been admitted; and if the fine be not paid or tendered to the lord or his steward within three months after such demand made, the lord may enter and receive the profits until he is paid the fine and costs, though the infant die before the fine and costs are paid; but the lord must account yearly for the profits and pay the surplus, if any, to the person entitled to the same (*m*). When the fine and costs have been fully paid, the lord must deliver up possession (*n*). If the guardian pays the fine he may enter and take the profits until he is reimbursed, notwithstanding the death of the infant before he is reimbursed (*o*). No forfeiture is to be incurred by an infant for not appearing or neglecting to pay fines (*p*).

(*h*) 2 Watk. Copy. 104, 105. For further particulars of this subject, see Watkins and Scriven on Copyholds.
(*i*) Sect. 3.
(*k*) Sect. 4.
(*l*) Sect. 5.
(*m*) Sect. 6.
(*n*) Sect. 7.
(*o*) Sect. 8.
(*p*) Sect. 9.

It is the infant who is admitted by the guardian, not the guardian himself; though the guardian has an interest in the land, and not merely an authority. He has the same powers as a guardian in socage (*q*). He has a double duty to perform, towards the infant and towards the lord. As regards the former, he must manage and cultivate the land to the best advantage, and may make such leases as are warranted by the custom, so that they do not exceed the minority of the ward; and he may bring an action for arrears of rent. If the ward be taken out of his custody, he can take steps to recover him.

As regards the lord, he is to render such services as a copyholder can render for another. He must pay the rent, and perform all such manorial rights as are extant. But he cannot swear fealty for his ward, or do any service in Court on his behalf, for such service must be a personal one (*r*).

If a guardian of a copyholder commits waste, his wardship only and not land is forfeited; for the infant is not answerable for the acts of his guardian who is assigned to him by law (*s*).

The guardian of an infant lord or tenant has power to do on his behalf any act or thing required by the Copyhold Acts to be done by such infant (*t*).

(3) Guardians by Special Appointment.

(a) Testamentary Guardians, or Statute Guardians, under 12 Car. II. c. 24.—This species of guardianship is modelled on that in socage, and sprung directly from the abolition of military tenures, and the conversion of the tenure of almost all lands into socage by 12 Car. II. c. 24. To supply the loss thus created of the feudal protection of infants (such as it was), provisions were framed in the Act to enable fathers to appoint guardians, who are often called "testamentary" because the power to appoint them by will was first given by this statute. By section 8 it was enacted that

"where any person hath or shall have any child or children under the age of twenty-one years, and not married at the time of his death, it shall and may be lawful to and for the father of such child or children, whether born at the time of the decease of the father, or at that time *en ventre sa mère*, or whether the father be within the age of twenty-one

(*q*) See *ante*, p. 610.
(*r*) Simp. Inf. 230, and the authorities there cited.
(*s*) Macph. Inf. 46.
(*t*) 57 & 58 Vict. c. 46, s. 45.

years, or of full age, by his deed executed in his lifetime, or by his last will and testament in writing, in the presence of two or more credible witnesses, in such manner and from time to time as he shall respectively think fit, to dispose of the custody and tuition of such child or children, for and during such time as he or they shall respectively remain under the age of one-and-twenty years, or any lesser time, to any person or persons in possession or remainder, other than Popish recusants, and that such disposition of the custody of such child or children made since the 24th day of February 1645, or hereafter to be made, shall be good and effectual against all and every person and persons claiming the custody or tuition of such child or children, as guardian in socage or otherwise; and that such person or persons to whom the custody of such child or children hath been or shall be so disposed or devised as aforesaid, shall and may maintain an action of ravishment of ward or trespass against any person or persons which shall wrongfully take away or detain such child or children, for the recovery of such child or children, and shall and may recover damages for the same, in the said action, for the use and benefit of such child or children."

Section 9 enacted that

"such person or persons to whom the custody of such child or children hath been or shall be so disposed or devised shall and may take into his or their custody, to the use of such child or children, the profits of all lands, tenements, and hereditaments of such child or children, and also the custody, tuition, and management of the goods, chattels, and personal estate of such child or children till their respective age of one-and-twenty years or any lesser time, according to such disposition aforesaid, and may bring such action or actions in relation thereunto as by law a guardian in common socage might do. . . ."

Appointment by Father Only.—By force of this statute a father has power to appoint a guardian for his infant child by deed or will. If the father be an infant himself he can appoint a guardian only by deed, for by the Wills Act (*u*) an infant is disqualified from making a valid will, unless he is in actual military service (*x*), which includes members of the Naval Marine or Air Forces (*y*), and where any such person dies after February 6, 1918, any appointment contained in his will of any person as guardian of the infant children of the testator shall be of full force and effect (*z*). This deed is in the nature of a testamentary disposition, and may be revoked by a subsequent will (*a*). A grandfather cannot make a valid appointment

(*u*) 1 Vict. c. 26, s. 7.
(*x*) Sect. 11.
(*y*) *Ibid.*, as interpreted by the Wills (Soldiers and Sailors) Act, 1918, c. 58, ss. 1, 2, 3, and 5 (2).
(*z*) *Ibid.*, s. 4.
(*a*) *Earl of Shaftesbury* v. *Hannam*, Finch. 323; see *Ex parte Earl of Ilchester*, 7 Ves. 348.

under this statute (*b*); nor a mere stranger by blood (*c*); nor a guardian already appointed (*d*). A mother had not the power to appoint a testamentary guardian (*e*); but the Court did have regard to the expression of her wishes if they were found to coincide with those of the father (*f*); she might, however, be appointed to the office. Her guardianship by nature and nurture was superseded by her husband's appointment of a testamentary guardian. If the father made an ineffectual appointment (*g*), or no appointment at all, she was the natural guardian of her infant children (*h*); and she was not disqualified merely because of her subsequent marriage (*i*).

Appointment by Mother.—Under the Guardianship of Infants Act, 1886 (*k*), the disability on the part of the mother to appoint a testamentary guardian was removed, and she was given the power to appoint by deed or will guardians to her infant children, such guardianship to take effect after the death of herself and her husband (*l*). She might also provisionally nominate a guardian to act jointly with the father as guardian of her infant children after her death (*m*). This provisional appointment should be in form an appointment of a guardian to act jointly with the father (*n*). Both parents were entitled to appoint guardians, who were to act jointly (*o*).

Guardianship of Infants Act, 1925.—By the provisions of this Act, which repeals section 3 of the Act of 1886, the power of the father and of the mother to appoint testamentary guardians is put on an equal footing, the father is only referred to first probably by reason of his coming first in alphabetical order. The equality is emphasized by the Act setting out separately the right of the father in one sub-section, and the right of the mother in the next sub-section:—

"Sect. 5.—(1) The father of an infant may by deed or will appoint any person to be guardian of the infant after his death.

(2) The mother of an infant may by deed or will appoint any person to be guardian of the infant after her death."

(*b*) *Blake* v. *Leigh*, Amb. 306. (*c*) *Powell* v. *Cleaver*, 2 Bro. C. C. 500.
(*d*) Macph. Inf. 83. (*e*) *Ex parte Edwards*, 3 Atk. 519.
(*f*) *Re Kaye*, L. R. 1 Ch. App. 387. (*g*) *Re Moore*, 11 Ir. C. L. 1.
(*h*) *Reg.* v. *Clarke*, 7 El. & Bl. 186; S. C. *Re Race*, 26 L. J. Q. B. 169.
(*i*) *Corbett* v. *Tottenham*, 1 Ba. & B. 59. The usual practice in the event of her subsequent marriage was to direct a reference under which she might be reappointed, if it were for the benefit of the infant. *Re Gornall*, 1 Beav. 347.
(*k*) 49 & 50 Vict. c. 27
(*l*) Sect. 3 (1). (*m*) Sect. 3 (2).
(*n*) *Re G. (an Infant)*, [1892] 1 Ch. 292; 61 L. J. Ch. 490.
(*o*) Sect. 3 (1).

Sub-section 3 provides that any guardian so appointed shall act jointly with the mother or father, as the case may be, of the infant so long as the mother or father remains alive unless the mother or father objects to his so acting. The power of the Court on such objection being made is dealt with in chap. III., *post*. Where guardians are appointed by both parents, the guardians so appointed shall after the death of the surviving parent act jointly (*p*), and if a guardian has been appointed by the Court to act jointly with a surviving parent he shall continue to act as guardian after the death of the surviving parent; but if the surviving parent has appointed a guardian, the guardian appointed by the Court shall act jointly with the guardian appointed by the surviving parent (*q*).

What is a Sufficient Appointment.—Testamentary guardians derive their authority from the parental appointment, and do not require any further qualification, even probate of the will appointing them (*r*). But if there is any dispute as to the validity of the appointment, the Court may direct the issue to be tried by a jury (*s*). An oral appointment is insufficient (*t*), but if the appointment is reduced into writing, no particular form of words is necessary for the appointment of a testamentary guardian, provided the intention to create a guardianship is clear and the powers essential to the office are conferred (*u*). Thus, the words, "I request Miss M., if she be alive at my decease, to take upon herself the management and care of the house and of my children," have been held enough (*x*); but a devise of the lands to a person in trust for the infant, and for his maintenance and education till he be of age (*y*), or an appointment of a person to be "guardian of the estate" (*z*), do not constitute the trustee or the guardian of the estate a testamentary guardian. An instrument designating a person as guardian need not be executed with the same formality as a will, and an appointment of a guardian by an unattested will, made good by a duly attested codicil, on the

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(*p*) 15 & 16 Geo. V. c. 45, s. 5 (5).
(*q*) Sect. 5 (6).
(*r*) *Gilliatt* v. *Gilliatt and Hatfield*, 3 Phil. Eccl. 222.
(*s*) *Re Andrews*, L. R. 8 Q. B. 153; S. C. 42 L. J. Q. B. 99.
(*t*) *Re Moore* (*ubi sup.*); *Re Mathews*, 12 Ir. C. L. 233.
(*u*) *Bridges* v. *Hales*, Mos. 108; *Miller* v. *Harris*, 14 Sim. 540; but see *Bedell* v. *Constable*, Vaugh. 177; *Re Lord Norbury*, 9 Ir. Eq. 134.
(*x*) *Miller* v. *Harris* (*ubi sup.*).
(*y*) *Bedell* v. *Constable* (*ubi sup.*).
(*z*) *Re Lord Norbury* (*ubi sup.*).

same paper, and referring to the will as annexed, and making certain alterations in it, but confirming it in other respects, was held good (*a*). An appointment by deed is only a testamentary instrument in the form of a deed (*b*), and may be revoked by a subsequent will (*c*). A testamentary guardian will not be disabled from exercising the office because he has attested the execution of the deed by which he was appointed (*d*), nor, it would seem, because of his attestation of the will so appointing him. Under the Act of Charles II., and the Guardianship of Infants Acts, 1886, and 1925, the parents have the power to nominate guardians for all their unmarried children at their decease, who have not attained and until they do attain, twenty-one years of age. A child *en ventre sa mère* is considered as one already born (*e*). This power of appointing does not extend to children who have attained their majority (*f*). The mother only, it would seem, has the power of appointing a guardian of a bastard (*g*). The guardianship may be determined before the child reaches its majority, but the creation of a guardianship without any time fixed would in all probability be held to be wardship during minority (*h*). Though the parents cannot under the Act appoint guardians for their infant children who have married, yet their marriage during infancy will not determine their wardship, at least in the case of males (*i*); in the case of females, there is more room for doubt. On the one hand, it may be urged that a woman on marriage leaves her parents' family, and so passes out of parental control, and comes under the power and protection of her husband; on the other, it may be said that the parents' strict right of appointing a guardian to watch her interests should not be broken in upon or curtailed by her marriage, contracted, perhaps, for the very purpose of escaping the wholesome but irksome restraint. The Court of Chancery will not permit the marriage of one of its

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(*a*) *De Bathe* v. *Lord Fingall*, 16 Ves. 167.
(*b*) *Ex parte Earl of Ilchester*, 7 Ves. 348.
(*c*) *Earl of Shaftesbury* v. *Hannam*, Finch. 323.
(*d*) *Morgan* v. *Hatchell*, 24 L. J. Ch. 135.
(*e*) 12 Car. II. c. 24, s. 8.
(*f*) *Ex parte Ludlow*, 2 P. Wms. 638.
(*g*) *Sleeman* v. *Wilson*, L. R. 13 Eq. 36. But see *Re Ullee*, 54 L. T. 286, as to when a father may appoint guardians to his children who are not legitimate by English law. This later case was decided before the Guardianship of Infants Act, 1886, but its principle would remain unaffected by that Act. And see *ante*, p. 593.
(*h*) *Mendes* v. *Mendes*, 1 Ves. Sen. 91.
(*i*) *Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. 103.

wards to end its wardship (*k*), and so, by analogy, the natural and obvious right of a parent to protect the child will be preserved intact, until she has reached the age at which the law sets her free from control, and endues her with the fullest responsibility for her actions.

Office Not Assignable.—The parents may appoint a guardian conditionally (*l*); or "in possession or remainder," that is, may appoint successors in the guardianship. They may also appoint a testamentary guardian, and yet recommend that their children may be placed under the care and control of other persons, subject to the general control of the guardian (*m*). The office of a guardian is personal and not assignable (*n*); therefore where more than one testamentary guardian is appointed, the office goes to the survivor; but the parent may authorize the surviving guardian to nominate another in the place of the guardian who has died (*o*). A joint testamentary guardian who has declined to accept the trust is not entitled as of right after the death of his co-guardian to be appointed guardian by the Court (*p*).

Who May be Appointed.—The Court of Chancery will not recognize the appointment of a firm as guardians (*q*).

In former times a father of any religious persuasion might exercise his right of appointing a guardian (*r*), but the person appointed must not have been a Roman Catholic (*s*). But since religious disabilities have almost totally disappeared both in England and Ireland, members of the Church of Rome are no longer ineligible for the office of tutor (*t*). Members of other religious bodies not in conformity with the Church of England have always been eligible. Accordingly a Jew (*u*), and now Roman Catholic ecclesiastics in England (*x*), and in Ireland (*y*), or a Dissenter (*z*), may be appointed.

(*k*) *Roach* v. *Garvan*, 1 Ves. Sen. 157.
(*l*) *Selby* v. *Selby*, 2 Eq. Cas. Abr. 488.
(*m*) *Knott* v. *Cottee*, 2 Ph. 192.
(*n*) *Eyre* v. *Countess of Shaftesbury* (*ubi sup.*); *Mellish* v. *Da Costa*, 2 Atk. 14.
(*o*) *In the Goods of Parnell*, L. R. 2 P. & D. 379; 41 L. J. P. M. & A. 35.
(*p*) *Re Johnstons* (*Infants*), 2 Jo. & Lat. 222.
(*q*) *De Mazar* v. *Pybus*, 4 Ves. 644.
(*r*) *Villareal* v. *Mellish*, 2 Swanst. 533.
(*s*) 12 Car. II. c. 24, s. 8.
(*t*) In England by the Roman Catholic Emancipation Act, 10 Geo. IV. c. 7; in Ireland by 33 Geo. III. c. 21.
(*u*) *Villareal* v. *Mellish*, *ubi sup.*
(*x*) *Talbot* v. *Earl of Shrewsbury*, 4 Myl. & Cr. 672.
(*y*) *Re Byrnes*, 21 W. R. 794.
(*z*) *Corbett* v. *Tottenham* 1 Ba. & B. 59.

Guardians of Person and Estate.—Testamentary guardians are entitled to the custody of the ward's person and property as against guardians in socage (if any), but not now against the mother (*a*); though if she be one with other testamentary guardians, while her wishes and opinions may be respected, yet in authority she is on an equality with the rest (*b*). If the mother under the Guardianship of Infants Act, 1886 (*c*), has provisionally appointed a guardian to act with the father, and the Court after her death is satisfied that he is not a person who ought to be the sole guardian of his children, the guardian whose appointment is confirmed by the Court would have equal rights with the father (*d*). When the guardians are unable to agree upon any question affecting the welfare of an infant ward, any of them may apply to the Court for its direction (*e*). After the death of both parents any guardian appointed under this Act may apply to the Court for directions as to the custody of his ward (*f*). But a person nominated by will, guardian of the estate of an infant during minority, is not such a testamentary guardian as to deprive the mother of the control and custody of the infant (*g*). As against all persons the guardian has the same remedies, as, for instance, the writ of *habeas corpus*, as the father had (*h*). If there be two testamentary guardians, and they are unable to agree on any question affecting the welfare of the infant, either of them may apply to the Court for its direction (*i*).

The testamentary guardian has the same power over the real estate of the ward as the guardian in socage. Under the Guardianship Act, 1886, every guardian in England and Ireland has all such powers over the estate and the person, or over the estate (as the case may be) of an infant as any guardian appointed by will or otherwise now has in England under 12 Car. II. c. 24, or in Ireland under 14 & 15 Car. II. c. 19, or otherwise (*k*). A testamentary guardian is entitled to

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(*a*) *Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. 103.
(*b*) *Campbell* v. *Mackay*, 2 Myl. & Cr. 31.
(*c*) 49 & 50 Vict. c. 27.
(*d*) Sect. 3 (2).
(*e*) Sect. 3 (3).
(*f*) Sect. 5.
(*g*) *Re Lord Norbury*, Ir. R. 9 Eq. 134.
(*h*) *Butler* v. *Freeman*, Amb. 302; *Re Andrews*, 8 L. R. Q. B. 153; S. C. 42 L. J. Q. B. 99.
(*i*) 15 & 16 Geo. V. c. 45, s. 6.
(*k*) 49 & 50 Vict. c. 27, s. 4.

administration in preference to a guardian chosen by an infant (*l*).

A testamentary guardianship is a trust; and therefore the Statute of Limitations does not run against the ward in the matter of accounts (*m*), but if on attaining majority he acquiesces in them, he will be barred (*n*). The cases applicable to guardians appointed by the father would now be applicable to those appointed by the mother (*o*).

(b) Guardians by Election of Infant.—It would be of no practical usefulness to treat of this kind of guardianship except in the briefest possible manner; for the power of the Court of Chancery has quite if not altogether superseded it. This right of an infant to choose a guardian for himself seems never to have been frequently exercised. An infant tenant in socage who has no testamentary guardian, may at the age of fourteen when socage guardianship determines, choose a guardian for the rest of his minority (*p*). An infant who was without a testamentary guardian, and had no socage lands, or whose interest in them was merely equitable, might, it seems, appoint such a guardian either before or after fourteen, but not before seven years of age (*q*).

The election might take place before a judge on circuit (*r*), or, as was most usual, by deed (*s*), or even by parol (*t*); but the appointment is not binding on the infant and will not supersede the authority of the Court of Chancery, which may appoint another (*u*).

(c) Guardians Appointed by a Court of Competent Jurisdiction. (i) By Court of Probate.—Administration *durante minore ætate* is the sole relic of the power of the old spiritual Courts of appointing a curator to an infant's personal estate, and is exercised by the Probate Division of the High Court of Justice, the successor to the ecclesiastical Courts (*x*).

Where an infant is appointed or becomes sole executor of a

(*l*) *In the goods of Morris*, 31 L. J. P. M. & A. 80.
(*m*) *Mathew* v. *Brise*, 14 Beav. 341.
(*n*) *Sleeman* v. *Wilson*, L. R. 13 Eq. 36.
(*o*) 49 & 50 Vict. c. 27.
(*p*) Co. Litt. 78 b; *Mendes* v. *Mendes*, 1 Ves. Sen. 91.
(*q*) Co. Litt. 87 b, 88 a.
(*r*) *Anon.*, 2 Ves. Sen. 374.
(*s*) *Lord Baltimore's Case*, Harg. n 15 to Co. Litt. 88 b.
(*t*) *Ibid.*
(*u*) *Ex parte Watkins*, 2 Ves. 470.
(*x*) *Brotherton* v. *Harris*, 2 Cas. temp. Lee, 131.

will, administration with the will annexed is to be granted to his guardian, or to such other person as the Court thinks fit, until the infant attains the age of twenty-one years, at which time probate of the will may be granted to him (*y*). The Court draws a distinction between an infant under seven and one who is over seven, but has not yet reached majority, for the Court will *ex officio* assign a guardian to the former (*z*), while the latter will be allowed to choose his own guardian (*a*). The choice of person in the absence of a guardian is quite in the discretion of the Court, and though it is the ordinary practice to appoint the next of kin, the Court is not bound to choose from their number (*b*); and if the infant make an unsatisfactory election, it will be controlled and set right (*c*).

Powers of Administrator Durante Minore Ætate.—An administrator during the minority of one entitled to administration, whether infant executor or infant next of kin, has, for the time, all the power and authority of an absolute administrator (*e*); thus, he may bring actions to recover debts due to the deceased (*f*); and also trover for his goods (*g*). The limit to his administration is the minority of the person, but there is no other limit (*h*). A power of sale given by a testator to his executors or administrators may be exercised by an administrator *durante minore ætate* (*i*). He may assent to a legacy, if there are assets for the payment of debts (*k*). Again, he may receive debts due to the deceased, and he may discharge and acquit them. So he may be sued for the debts due from the deceased; and if he give his bond for any of such debts, he may retain goods to the value (*l*); and if an action be brought

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(*y*) Supreme Court of Judicature Consolidation Act, 1925, s. 20, sub-s. 1.
(*z*) 1 Wms. Exors. pp. 387, 388.
(*a*) *Rich* v. *Chamberlayne*, 1 Cas. temp. Lee, 134.
(*b*) See 1 Wms. Exors. 388. For the addition of an infant on attaining twenty-one to a suit commenced by the administrator, see Order XXVII. r. 4. The next-of-kin is entitled to the administration before creditors. *John* v. *Bradbury*, L. R. 1 P. & D. 245; 36 L. J. P. M. & A. 33. For further information as to whom the Court will grant or refuse administration, see 1 Wms. Exors. (*ubi sup.*) and Simp. Inf. 238.
(*c*) *Re Burchmore*, L. R. 3 P. & D. 139; 43 L. J. P. M. & A. 1.
(*e*) Com. Dig. Administration, F.
(*f*) *Piggott's Case*, 5 Co. Rep. 29 a; Com. Dig. Administration, F.
(*g*) *Sethe* v. *Sethe*, Roll. Abr. Exors. (M) pl. 2; Com. Dig. (*ubi sup.*).
(*h*) 1 Wms. Exors. 393.
(*i*) *Monsell* v. *Armstrong*, L. R. 14 Eq. 423; 41 L. J. Ch. 715; *In re Cope*, *Cope* v. *Cope*, 16 Ch. D. 49; 50 L. J. Ch. 13.
(*k*) *Prince's Case*, 5 Co. Rep. 29 a.
(*l*) *Briers* v. *Goddard*, Hob. 250.

against him, and the administration determine pending the action, he ought to retain assets to satisfy the debt which attached on him by the action (*m*). Likewise he may retain for his own debt (*n*).

(ii) Guardians Appointed by the Court of Chancery.—The superintendence of the care and custody of infants has for long been one of the most well-defined and fully developed branches of equity jurisprudence. The Court of County Palatine has concurrent jurisdiction with the High Court to appoint guardians, but subject to a general right of interference by the Chancery Division (*o*). But even this salutary power of the Court of Chancery has its practical limits, for the Court cannot, and does not, take upon itself to maintain and supervise the interests of all the infants in the kingdom, and it has not the means of acting, except where it has property to act upon (*p*); not from any want of jurisdiction, but from a want of means to exercise it, by applying the property for the use and maintenance of the infants (*q*). But the possession of property does not seem to be a necessary condition precedent to the interference of the Court so as to award custody of the person (*r*).

Grounds for Appointment by the Court.—The Court of Chancery will appoint guardians for infants who have no father or mother or testamentary guardians. Wherever the infant is unprotected, or injury or detriment of the infant is apprehended, then the Court will intervene and appoint a guardian responsible to itself, who becomes an officer of and responsible to the Court (*s*), and who will act for the benefit and interest of the ward; and its jurisdiction is not ousted by the fact of the infant being lunatic or of unsound mind (*t*).

A guardian will be appointed on the petition of the infant himself, or of some person on his behalf, though no action has

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(*m*) *Sparks* v. *Crofts*, Comberb. 465.
(*n*) *Roskelly* v. *Godolphin*, T. Raym. 483.
(*o*) *Re Alison's Trusts*, 8 Ch. D. 1; 47 L. J. Ch. 755.
(*p*) *Wellesley* v. *Duke of Beaufort*, 2 Russ. 1, 19.
(*q*) The usual way is to settle money on the infant (some small sum such as £100 is enough), and to bring a suit for its administration.
(*r*) *Re Spence*, 2 Ph. 247; *Re Fynn*, 2 De G. & Sm. 457; *Brown* v. *Collins*, 25 Ch. D. 56; 53 L. J. Ch. 368; *Re Scanlan (Infants)*, 40 Ch. D. 200; 57 L. J. Ch. 718; *Re Nevin*, [1891] 2 Ch. 299; 60 L. J. Ch. 542; *Barnardo* v. *M'Hugh*, [1891] App. Cas. 388; *Re M'Grath (Infants)*, [1893] 1 Ch. 143; 62 L. J. Ch. 208.
(*s*) *Wellesley* v. *Duke of Beaufort*, 2 Russ. 1.
(*t*) *Re Edwards*, 10 Ch. D. 605; 48 L. J. Ch. 233.

been begun (*u*); even where there are testamentary guardians and they decline to act (*x*), or disagree (*y*), or where the infant has lawfully appointed a guardian for himself (*z*). Where a suit is pending, a guardian of the *person* only is appointed, the estate being under the direction of the Court; but the Court does not take upon itself the actual guardianship of the infant (*a*). Where there is no suit pending which will enable the Court to take upon itself the management of the infant's property, a guardian of the estate as well as of the person may be appointed on summons.

How Guardians are Appointed.—Guardians are now appointed in a summary way by an originating summons in chambers, without requiring a bill to be filed (*b*); formerly filing a petition was the proper method. If no action or matter be pending, an originating summons is taken out in the name of the infant *pro hac vice*, and is intituled in the matter of the infant, and has the effect of making him a ward of Court (*c*). An application must be supported by evidence as to the age of the infant, his fortune and income, or other material particulars of the estate (*d*), and as to the number of his relations. Evidence must also be produced of the fitness of the proposed guardian, and of his willingness to take upon himself the duties of the office (*e*). The usual course is to appoint a guardian of the person and estate, without a receiver, and he is usually required to enter into a recognizance duly to account, with sureties; the security will be regulated by the amount which the guardian is likely to receive during the currency of his periodical account; but where the amount of the income or fortune is very small, the Court may dispense altogether with the security, and will be content with the guardian undertaking to account (*f*). The costs of an application to

(*u*) By summons in chambers; 2 Dan. Ch. Pr. 1113. See *Re Findlay* (*an Infant*), 32 Ch. D. 221; 55 L. J. Ch. 395.

(*x*) *Ex parte Champneys*, 2 Dick. 350.

(*y*) *Lady Teynham* v. *Lennard*, 4 Bro. P. C. 302.

(*z*) *Curtis* v. *Rippon*, 4 Madd. 462; *Coham* v. *Coham*, 13 Sim. 639.

(*a*) Macph. Inf. 100.

(*b*) Order LV. r. 2 (12), also rules 2 and 3 of the Supreme Court Rules made under the Guardianship of Infants Act, 1886.

(*c*) *Stuart* v. *Marquis of Bute*, 9 H. L. Cas. 440.

(*d*) 2 Dan. Ch. Pr. 1120.

(*e*) Dan. Ch. Pr. 1119.

(*f*) *Ibid.* 1120. According to the old practice the guardian of the person was required to enter into recognizances that the infant should not marry without the leave of the Court, but in special circumstances the recognizance was on the condition that the infant should not be married without the leave of the Court,

appoint a guardian will be paid out of the infant's property by a sale if necessary (*g*); or by allowing them to a guardian in his accounts (*h*).

Jurisdiction over Infants Domiciled Abroad.—The Court of Chancery has jurisdiction over the custody of English subjects although born and domiciled out of England, and can appoint guardians for an infant domiciled abroad, in a proper case, though his property is situated in a foreign country, by the Courts of which guardians for the infant have been appointed (*i*); also for an infant who is out of the jurisdiction, but whose property is within it or under the control of the Court; but it is usual to require that the parent or one of the guardians should be within the jurisdiction, in order that some one may be answerable to the Court (*k*). The English nationality of the infant must be clearly made out to give the English Courts jurisdiction (*l*). The power to appoint guardians to infants, or to make them wards of Court, is not limited by the English domicil of the infant, or by the fact that he has no property in this country (*m*); and an infant when resident in England has been made a ward of Chancery though domiciled in Scotland, and having all his property there (*n*).

Who May be Appointed.—The Court has ample scope for the exercise of its choice of guardians, and no *prima facie* claims, however strong, will be allowed to prevail against it if the infant's benefit warrants their supersession. It will, even in the lifetime of the father, for strong reasons, appoint another as guardian to his child (*o*); it will set aside the claims of the mother if she be unfit (*p*). It will also attach very little importance to guardianship in socage, or the election of

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by the consent, privity or connivance of the committee. It appears to be the modern practice not to require a recognizance from the guardian of the person, unless perhaps there is an apprehension of an improper marriage. Simp. Inf. 249.

(*g*) *Barlow* v. *Cooke*, 5 Ves. 461.

(*h*) *Ex parte Thomas*, Amb. 146.

(*i*) *Hope* v. *Hope*, 4 De G. M. & G. 328; *Dawson* v. *Jay*, 3 De G. M. & G. 764; *Re Willoughby (an Infant)*, 30 Ch. D. 324; 54 L. J. Ch. 1122.

(*k*) *Logan* v. *Fairlee*, Jac. 193; *Hope* v. *Hope (ubi sup.)*; Dan. Ch. Pr. 1117, and cases there cited.

(*l*) *Re Bourgeoise*, 41 Ch. D. 310.

(*m*) *Re Willoughby (an Infant)*, 30 Ch. D. 324; 54 L. J. Ch. 1122.

(*n*) *Johnstone* v. *Beattie*, 10 Cl. & Fin. 42.

(*o*) *Ex parte Mountfort*, 15 Ves. 445; *Wellesley* v. *Duke of Beaufort*, 2 Russ. 1; *Thomas* v. *Roberts*, 3 De G. & S. 758; 19 L. J. Ch. 506; *ante*, Part II., Parent and Child, chap. ii.

(*p*) *Heysham* v. *Heysham*, 1 Cox. Eq. Cas. 179

the infant, and will set aside a guardian in socage (*q*), or one appointed by the infant himself (*r*); so, too, where testamentary guardians are unfit for their trust they will be superseded (*s*), or removed (*t*).

It has been laid down that a married woman ought not to be appointed as sole guardian (*u*). The solicitor for any of the parties who exercise a control over the infant's estate must not be appointed guardian of the infant's person (*x*).

Interests of Ward Test of Fitness.—The Court in choosing guardians will be guided entirely by the interests of the ward; and though not bound to limit its choice will (*cæteris paribus*) select the nearest relations (*y*). But if the father's wishes, or the infant's manifest advantage, are against the appointment, the claims of the mother or nearest relatives will be postponed. So, too, if the mother's wishes and the infant's manifest interests are against the father being left sole guardian, the Court has jurisdiction to appoint other guardians with him (*z*). The Court will pay regard to the wishes of the father, whose intended appointment has miscarried through some informality, and appoint the individual so nominated without a reference (*a*). The Court formerly regarded the wishes of the mother as deserving of attention, though she could not, like the father, make any valid appointment (*b*); and would give effect to her rights under the Guardianship of Infants Act, 1886, though such rights had been informally expressed by her (*c*). Under the Guardianship of Infants Act, 1925 (*d*), in any proceeding where the custody or upbringing of an infant or the administration of any property of the infant is in question, the Court is not to consider whether the claim of the father, or any right at common law possessed by the

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(*q*) *Hunter* v. *Macrae*, cited Macph. Inf. 112; *Ex parte Watkins*, 2 Ves. Sen. 470.

(*r*) *Curtis* v. *Rippon* (*ubi sup.*); *Coham* v. *Coham* (*ubi sup.*).

(*s*) *Beattie* v. *Johnstone*, 10 Cl. & F. 42.

(*t*) 49 & 50 Vict. c. 27, ss. 6, 13.

(*u*) *Re Kaye*, L. R. 1 Ch. App. 387. See *Re Duke of Somerset, Thynne* v. *St. Maur*, 34 Ch. D. 465; 56 L. J. Ch. 733.

(*x*) *Re Johnstons* (*Infants*), 2 Jo. and Lat. 222. See *Re Kemp's Settled Estates*, 24 Ch. D. 485; 52 L. J. Ch. 590.

(*y*) *Beattie* v. *Johnstone* (*ubi sup.*); Simp. Inf. 246, and the cases there cited; *Hunter* v. *Macrae*, cited Macph. Inf. 112; *Darcy* v. *Lord Holderness*, 1 P. Wms. 704 n.

(*z*) 49 & 50 Vict. c. 27, s. 3.

(*a*) *Hall* v. *Storer*, 1 Y. & C. Ex. 556.

(*b*) *Re Kaye*, L. R. 1 Ch. App. 387.

(*c*) *Re G.* (*an Infant*), [1892] 1 Ch. 292; 61 L. J. Ch. 490.

(*d*) 15 & 16 Geo. V. c. 45.

father, is superior to that of the mother, or the claim of the mother is superior to that of the father, from any other point of view than the welfare of the infant, but is to regard the welfare of the infant as the first and paramount consideration (*e*). Section 2 of the Act of 1886 is repealed, and on the death of either parent the surviving parent becomes guardian either alone or jointly with any guardian appointed by the deceased parent; and where the deceased parent has appointed no guardian, or the guardian appointed is dead or refuses to act, the Court may appoint a guardian to act jointly with the surviving parent (*f*). Regard will also be paid to the wishes of an infant who being of years of discretion has chosen a guardian for himself, who, if a proper person, will either be appointed alone (*g*), or in conjunction with others (*h*).

Guardian Appointed to a Bastard Child.—Though a testator cannot by will lawfully appoint anyone to be the guardian of his bastard child (*i*), yet the Court may, without reference, grant the guardianship of the infant to the person so nominated (*k*). A father of a bastard will not as a rule be appointed its guardian unless he settles property on it; but in one case the Court on the death of the mother did appoint the father as guardian of his illegitimate child, for whom he evinced much affection; and the child was delivered into his custody on the terms that the maternal aunt, whom its mother had left as the guardian, should have reasonable and proper access to it (*l*). But the Court has refused to appoint the mother guardian to her bastard daughters who took a fortune under their father's will (*m*).

For termination of office of guardian, see *post*, chap. iv.

(4) Foreign Guardians.

Where an infant is within the jurisdiction of the Court of Chancery for whom a guardian has been appointed in a

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(*e*) Sect. 1.
(*f*) Sect. 4.
(*g*) *Ex parte Edwards*, 3 Atk. 519
(*h*) *Mansell's Case*, 2 Swanst. 536.
(*i*) *Sleeman* v. *Wilson*, L. R. 13 Eq. 36.
(*k*) *Chatteris* v. *Young*, 1 J. & W. 106; but see *Elwes* v. *Const*, 1 Madd. Ch. Pr. 435.
(*l*) *Ord* v. *Blackett*, 9 Mod. 116. In this case the dispute was between the father and the mother's sister, who was appointed executrix and guardian under the mother's will, by which real property was left to the child. The Court also ordered the sum for the child's maintenance and education to be paid to the father.
(*m*) *Curtois* v. *Vincent*, Jac. 268.

foreign country (whether by act of parties or some competent tribunal), difficult questions sometimes arise as to the rights and powers of the foreign guardian within the jurisdiction of the Court of Chancery. This conflict arises from the fact that the appointment of a guardian is territorial, that is, confined to the jurisdiction of a country in which he is appointed, and cannot, except by the comity of nations, be recognized by foreign countries. Mr. Dicey, in his work on Domicil (*n*), sums up very accurately the strict rule of law on the subject. He says: "A guardian appointed under the law of a foreign country (called hereinafter a foreign guardian), has no direct authority as guardian in England; but the English Courts recognize the existence of a foreign guardianship, and will, in their discretion, give effect to a foreign guardian's authority over his ward." This rule coincides with the opinion of Story, who holds that "notwithstanding that a foreign guardian has no absolute rights as such in a foreign jurisdiction, the fact that he is such is entitled to great weight in the Courts of another when called upon to determine, in their discretion, to whose custody a minor child shall be committed; and if it appears for the best interests of the child that he should be under the care and custody of a guardian appointed in a foreign State, the Court may so decree, even though another guardian has been appointed in the State where the minor subsequently is found" (*o*). Thus, it may be said that foreign guardians as such have no rights here in England, their powers and functions are confined to the limits of the country in which they have been appointed; and the Court of Chancery has the power to appoint its own guardians for any infant within its jurisdiction, who is without a parent or guardian, whether the infant does or does not possess property within the jurisdiction (*p*).

It is possible to trace the tendency of the English law towards the more complete recognition of the rights of foreign guardians. Thus, the case of *Johnstone* v. *Beattie* (*q*) may

(*n*) Rule 28, p. 172.
(*o*) Conf. Laws, s. 499 a.
(*p*) *Johnstone* v. *Beattie*, 10 Cl. & F. 42.
(*q*) *Ubi sup.* See Lord Cottenham's remarks (p. 114): "Foreign tutors and curators . . . cannot be English guardians without being able to derive their authority from some one of the sources from which the English law considers that the right of guardianship must proceed; and it has before been shown that the rights and duties of a foreign tutor and curator cannot be recognized by the Courts of this country with reference to a child residing in this country. The

prima facie be taken as an authority that foreign guardians were powerless here in England as against guardians appointed by the Court of Chancery to wards who were domiciled subjects of a foreign country, and were only temporarily resident in England. But with reference to that case Lord Campbell, when Lord Chancellor, said in *Stuart* v. *The Marquis of Bute* (*r*): "All that can be considered as judicially decided by the House was, that if there be a foreign child in England, with guardians duly appointed in the child's own country, the Court of Chancery may, without any previous inquiry whether the appointment of other guardians is or is not necessary, and would or would not be beneficial for the child, make an order for the appointment of English guardians" (*s*).

In the later case of *Di Savini* v. *Lousada* (*t*), where an Italian Court had appointed guardians for an Italian infant who came to England, and being made a ward in Chancery was, with the consent of the Italian guardians, placed in the custody of English guardians, who did not carry out the directions of the Italian guardians, the Court of Chancery, upon the application of the Italian Court, appointed new guardians and declared its readiness to carry out in all respects the orders of the Italian Court with regard to the infant, so far as might be consistent with the laws of England. In the case of *Nugent* v. *Vetzera* (*u*) it was held that the Court of Chancery might appoint guardians for infants temporarily within the jurisdiction, but the power and control of the foreign guardians appointed by proper and competent tribunals will be respected (*x*). *Dawson* v. *Jay* (*y*) is no authority for saying that foreign guardians will not be permitted to take their wards out of the jurisdiction, but only *under certain circumstances* they will be prevented by the Court from so doing, and it will not compel their removal out of the jurisdiction.

Right to Custody of Ward. -The rights of foreign guardians to the control and custody of their wards (subjects

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result is that such foreign tutor and curator can have no right as such in this country."

(*r*) 9 H. L. Cas. 440, 464.

(*s*) See also *Ex parte Watkins*, 2 Ves. Sen. 470.

(*t*) 22 L. T. 61.

(*u*) L. R. 2 Eq. 704.

(*x*) See *Re Bourgeoise*, 41 Ch. D. 310.

(*y*) 3 De G. M & G. 764

of a foreign country) for whom English guardians have been appointed, will be respected and not interfered with, and if the foreign guardians think, in the honest exercise of their discretion, that it would be for the advantage and interest of their wards to remove them out of England, the Court of Chancery will permit them to do so (*z*). This is an acknowledgment of the principle that the status of persons with respect to acts done and rights acquired in the place of their domicil, and contracts made concerning the property situated therein, will be governed by the law of that domicil, and that England . . . will hold as valid or invalid such acts, rights, and contracts accordingly as they are holden valid or invalid by the law of the domicil (*a*). But the Court of Chancery reserves to itself the right to interfere with the control of the foreign guardian, and will not permit him to exercise any powers over his ward which could not be exercised by an English guardian (*b*).

Powers of Guardian over Ward's Property.—The next point to be considered is the powers of the foreign guardian over the property of the ward situate within the jurisdiction of the Court of Chancery. As regards real or immovable property, it is clear that the *lex rei sitæ*, *i.e.*, the law of England, must regulate his power, and unless the foreign guardian come in and qualify and be appointed guardian by the Court, he would have no power to deal with immovables. Where the infant and guardians are domiciled abroad, and the infant is a tenant for life within the meaning of the Settled Land Act, 1882, and the foreign guardians are fit and proper persons to be trustees under the Act, the Court will appoint them as such trustees, notwithstanding their foreign domicil (*c*). As regards personal or movable property, the right of a foreign guardian has not been the subject of an actual decision (*d*), and therefore is still within the region of speculation. But according to the common law of this country, the rights of a guardian are deemed to be strictly territorial, and so no foreign guardian can *virtute officii* exercise any rights or powers over the movable property of his

(*z*) *Stuart* v. *Marquis of Bute*, 9 H. L. Cas. 440; *Di Savini* v. *Lousada*, 22 L. T. 61; *Nugent* v. *Vetzera*, L. R. 2 Eq. 704. The complete supersession of the foreign guardian would be an offence against the comity of nations, and tend to put an end to the interchange of friendship between civilized communities.

(*a*) Phil. Int. Law, s. 381.

(*b*) Dicey, Dom. 176.

(*c*) *Re Simpson*, *Re Whitchurch*, [1897] 1 Ch. 256; 66 L. J. Ch. 166.

(*d*) See remarks of Wood, V.-C., in *Scott* v. *Bentley*, 24 L. J. Ch. 244.

ward in a country other than that in which he has been appointed without conforming to the law of the place in which the movables are situate (*e*). This is clearly the law of the American States (*f*), but the Scottish Courts are more inclined to defer to the appointment made by the *lex domicilii* of the minor and his guardians (*g*). If the infant be domiciled in this country, his personal property must be dealt with according to English law (*h*); but if he be domiciled abroad, personal property will be paid over to him, if by the law of his domicil he is entitled to receive it (*i*), and to his foreign guardian if he be also entitled to receive it (*k*). In the earlier case of *Re Hellman's Will* (*l*), payment to the foreign infant's foreign guardian was refused. This decision was practically followed in another case on the ground that the Court was not bound to pay out a fund in Court to a foreign guardian as of right, and that evidence ought to be produced to show that the fund would be applied for the benefit of the infant (*m*). The Court of Probate may grant administration in England to the duly appointed foreign guardians of infants domiciled abroad (*n*).

Tutors appointed by will in a foreign country are not testamentary tutors within 12 Car. II. c. 24 (*o*).

(5) Guardians Appointed for Special Purposes.

Guardians may be appointed by the Chancery Division for the special purposes provided for by the following Acts:—

(a) To give legal consent to the infant's marriage under 15 & 16 Geo. V. c. 45.

(b) To consent on behalf of infant under the Improvement of Lands Act, 1864 (27 & 28 Vict. c. 114) (*p*).

(c) To consent to improvements being effected on the infant's property (*e.g.*, building a mansion-house)

(*e*) See Dicey, Dom. 176.

(*f*) Story, Conf. Laws, s. 504 a, and the cases there cited.

(*g*) Fraser, Par. and Ch. 602 *et passim*.

(*h*) *Gambier* v. *Gambier*, 7 Sim. 263.

(*i*) *In the goods of the Countess da Cunha*, 1 Hag. Con. Rep. 237; *Re Hellman's Will*, L. R. 2 Eq. 363.

(*k*) *Re Crichton's Trusts*, 24 L. T. (o.s.) 267; *Re Ferguson's Trusts*, 22 W. R. 762 (Irish case).

(*l*) *Ubi sup.*

(*m*) *Re Chatard's Settlement*, [1899] 1 Ch. 712; 68 L. J. Ch. 350.

(*n*) *In the goods of Sartoris*, 1 Curt. 910.

(*o*) *Johnstone* v. *Beattie*, 10 Cl. & F. 42; *Scott* v. *Bentley*, 1 K. & J. 281; 24 L. J. Ch. 244; *Stuart* v. *Marquis of Bute*, 9 H. L. Cas. 440.

(*p*) Set. Judg. & Ord. 841.

under the Limited Owners Residences Act, 1870 (33 & 34 Vict. c. 56) (*q*).

(d) To concur in the grant of a site for a church, &c., under the Places of Worship Sites Act, 1873 (36 & 37 Vict c. 50). The father of the infant is a competent person for this purpose (*r*).

(e) To consent on behalf of the infant for purposes under the Vendor and Purchasers Act, 1874 (37 & 38 Vict. c. 78) (*s*).

Quasi-Guardianship.—A *quasi*-guardianship often arises at law where there has been no regular appointment, or an appointment without jurisdiction, or there has been some intermeddling. The general principle thus recognized is that any person who takes possession of an infant's property takes it in trust for the infant. Hence, Courts of equity will always protect the infant in such cases by holding the person who acts as guardian strictly accountable (*t*). And where a guardian continues to manage his ward's property at his request after he has attained his majority, he must account upon the same footing as if the transactions were during the ward's minority (*u*).

Guardians, or Committees of Lunatics.—Guardians or curators are appointed not only to infants and minors, but also to idiots, lunatics, and persons of unsound mind (*x*), for the purpose of tending their persons and managing their estates; these guardians are usually called "committees"; and the Court of Chancery may appoint a guardian to an infant lunatic not so found by inquisition, where the property is small, and it is impossible to obtain an order in lunacy (*y*).

Custody of Infant Felons.—The Court of Chancery has been entrusted with certain powers over infants convicted of felony (*z*); thus it may assign the care of an infant convicted of felony to any person other than the testamentary or natural guardian (*a*). The person to whom the custody is assigned must not send the child beyond the seas or out of the jurisdiction of the Court (*b*). The execution of the sentence passed upon the

(*q*) Set. Judg. & Ord. 841.
(*r*) *Marquis of Salisbury's Case*, 2 Ch. D. 29; 44 L. J. Ch. 541.
(*s*) Set. Judg. & Ord. 841.
(*t*) See *Revett* v. *Harvey*, 1 Sim. & St. 502; 2 L. J. Ch. 39.
(*u*) *Mellish* v. *Mellish*, 1 Sim. & St. 138; 1 L. J. Ch. 120.
(*x*) Lunatic is "any idiot or person of unsound mind." 53 Vict. c. 5, s. 341.
(*y*) *Vane* v. *Vane*, 2 Ch. D. 124; 45 L. J. Ch. 381.
(*z*) 3 & 4 Vict. c. 90.
(*a*) Sect. 1.
(*b*) Sect. 2.

conviction of the infant is not to be affected or interfered with (*c*).

Children Act, 1908.—Where a person having the custody, charge, or care of a child is convicted of an offence under the Offences Against the Person Act, 1861 (*d*) (including manslaughter, abandoning or exposing the child so that its life is endangered, abduction of a girl, or enticing a child away from its parents' charge, assault and battery, aggravated assault, and indecent assault), or of an offence under the Criminal Law Amendment Act, 1885 (*e*), or under the Dangerous Performances Acts, 1879 (*f*) and 1897 (*g*), or any other offence involving bodily injury to the child, or is committed for trial for any such offence, or is bound over to keep the peace towards such child by any Court, that Court and also any petty sessional Court before which any person may bring the case, may, if satisfied on inquiry that it is expedient, order that the child be taken out of the custody of the person so convicted or committed for trial or bound over, and be committed to the care of a relative, or some other fit person named by the Court until he attains the age of sixteen years or for any shorter period (*h*). The order becomes void on acquittal of the person charged or if the charge is dismissed for want of prosecution (*i*). The Secretary of State may discharge a child from the care of any person to whose care he has been committed under the Act (*k*), and may authorize the emigration of the child (*l*). The new guardian has the same control as a parent, and is equally liable for maintenance, and the Court has the like power to order the parent to pay maintenance as though the child were sent to an industrial school, except where the parent is only committed for trial (*m*). The religious persuasion of the guardian is, if possible, to be that of the child (*n*). Where there is reasonable cause to suspect that a child has been or is being assaulted, ill-treated, or neglected in a manner likely to cause the child unnecessary suffering, or to be injurious to his health, or the child has been the subject of an indecent assault or of cruelty, a warrant may be issued to search for the child, and if it is found that he has been so treated the custody of

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(*c*) Sect. 4.
(*d*) 24 & 25 Vict. c. 100.
(*e*) 48 & 49 Vict. c. 69.
(*f*) 42 & 43 Vict. c. 34.
(*g*) 60 & 61 Vict. c. 52.
(*h*) 8 Edw. VII. c. 67, s. 24.
(*i*) Sect. 21 (4).
(*k*) Sect. 21 (5).
(*l*) Sect. 21 (6).
(*m*) Sect. 22.
(*n*) Sect. 23.

the child may be committed to the care of a relative or other fit person, by a Court of Summary Jurisdiction, in like manner as if the person in whose care he was had been committed for trial (*o*). Where a child is by an order of any such Court removed from the care of any person, and that person is entitled under any trust to receive money in respect of its maintenance, the Court may order the whole or part of such sum to be paid to the person to whose care the child is committed, to be applied for the benefit of the child in such manner as, having regard to the terms of the trust, the Court may direct (*p*).

As to punishment of parents or guardians for neglect of children see c. V., *post.*

(*o*) Sect. 24.
(*p*) Sect. 127.

CHAPTER III.

JUDICIAL CONTROL OVER GUARDIANS, PARENTS AND TRUSTEES.

GUARDIANSHIP is a trust (*a*), and the Court of Chancery, as having the supreme control over trusts, sees that trusts are strictly carried out for the benefit of those in whose interests they were created; and will remove trustees who fail in their duty, and appoint fresh ones in their stead (*b*). The Court will thus interfere with those guardians who are appointed to the person of an infant; and this species of guardianship is a more exacting kind of trusteeship than the mere trust to hold and dispose of his property (*c*). The Court also exercises a vigilant care over guardians of the estate in regard to the management and disposal of the property of infants; and will carry its aid and protection in their favour so as to reach other persons than those who are guardians strictly appointed; for if one intrudes on the estate of an infant, and takes the profits thereof, he will be treated as a guardian, and held responsible to the infant in a Court of equity (*d*). Any breach of trust by a guardian will be punished; and if mismanagement of the infant's property is suspected, any person may make an application to the Court on behalf of the infant (*e*); and it has been laid down that if any wrong steps have been taken which might not deserve punishment, yet if they were such as induced the least suspicion of the infant's being likely to suffer by the conduct of the guardians, or if the guardians chose to make use of methods that might turn to the prejudice of the infant, the Court will intervene (*f*).

The jurisdiction of the Court over guardians covers the care of the person of the infant ward in respect of his protection and education, and over the property of the infant in respect of its

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(*a*) *Mathew* v. *Brise*, 14 Beav. 341; *Sleeman* v. *Wilson*, L. R. 13 Eq. 36.
(*b*) *Letterstedt* v. *Broers*, 9 App. Cas. 371; 53 L. J. P. C. 44.
(*c*) *Duke of Beaufort* v. *Berty*, 1 P. Wms. 703.
(*d*) Story, Eq. s. 1356; *Nanney* v. *Williams*, 22 Beav. 452.
(*e*) *Lord Dudley's Case*, cited 2 Ves. Sen. 484.
(*f*) Per Lord Hardwicke in *Duke of Beaufort* v. *Berty*, 1 P. Wms. 703.

due management and preservation, and the proper application of it for the ward's maintenance.

Jurisdiction of Court over Parents.—The Court has ample power to remove a child from the control of its father and place it under that of its mother till it reaches the age of sixteen (*g*). It can remove an infant altogether out of the power of its parents, if their character and conduct are of so gross a nature as to make it almost certain that detriment to the child would ensue by remaining in their company (*h*). The judicial discretion of the Court is to be exercised with a view to the welfare of the infant, the conduct of the parents, and the wishes as well of the mother as of the father (*i*); and the wishes of the mother will be considered even where she equally with the father has been guilty of a matrimonial offence (*k*). Another ground for its interference with the parental control is where the parent has acquiesced for a long period in the appointment of a stranger as guardian of the child, whom he has allowed to be brought up and educated by the guardian, more especially where the parent being of straitened means, has himself taken some pecuniary benefit as the price of his acquiescence, and the child's reasonable prospects and expectations would be defeated (*l*). Where the mother is unfit to retain the custody of her children, whether in her capacity of natural or testamentary guardian, the Court will remove them out of her control (*m*).

Jurisdiction over Guardians.—The jurisdiction of Chancery extends over guardians properly so called, including guardians by operation of law, or socage guardians, those chosen by the infant himself, testamentary guardians, or those appointed by the parents, and Chancery guardians, or those appointed by the Court itself. The Court will also superintend and control guardians appointed by a foreign Court, and recognized as having authority in this country, and will, if necessary, appoint new guardians in their place to take charge of the wards. The Court has full power to control and interfere with the common law guardian in socage, and the guardian appointed by the infant himself. Its control will be exercised over a testamentary

(*g*) Under 36 Vict. c. 12.
(*h*) 49 & 50 Vict. c. 27, s. 3 (2); 52 & 53 Vict. c. 56; 54 Vict. c. 3.
(*i*) *Re. A. & B.* (*Infants*), [1897] 1 Ch. 786; 66 L. J. Ch. 592.
(*k*) *Ibid.*
(*l*) 49 & 50 Vict. c. 27, s. 3 (2); 52 & 53 Vict. c. 56; 54 Vict. c. 3.
(*m*) See *ante*, Part II., Parent and Child, chap. ii. p. 491; 49 & 50 Vict. c. 27, s. 2.

guardian if his conduct be improper (*n*), and orders may be made by the Court regulating his conduct (*o*). Where guardians, whether appointed by the father or the mother, are unable to agree upon questions affecting the welfare of the ward, either of them may apply to the Court for its direction, upon which application it may make such order as it may think fit (*p*). The Court will restrain a testamentary guardian from exercising his legal powers without any misbehaviour on his part, simply on the ground of the infant's benefit (*q*). The Court, however, will not lightly interfere with the control of a guardian, and where a penniless child is under the care of a legal guardian who is able and willing to maintain it at his own expense, the duty of the Court is to leave the child alone, unless it is satisfied that it is for the welfare of the child that some other course should be taken. The first and paramount matter for the consideration of the Court is the welfare of the child (*r*), which is not to be measured by money only, or by physical comfort only, but is to be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being, nor are the ties of affection to be disregarded (*s*), though they are not conclusive (*t*).

Control of Education and Residence.—The guardians are the proper judges of the method of educating their ward; but if they disagree, the Court will exercise its own discretion on the subject, and will not consider itself bound by the wishes of the majority. Where the father of the ward has expressed his wishes either openly or impliedly as to the religious faith in which his child is to be brought up, the Court will listen and give effect to them (*u*), and the mother's wishes will now have equal weight given to them (*x*). Parol evidence will be admitted to prove the father's wishes (*y*), and presumably to prove the mother's wishes. In general the testamentary guardian is entitled to the custody of the ward's person, but the Court may

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(*n*) *Talbot* v. *Earl of Shrewsbury*, 4 Myl. & Cr. 672.
(*o*) *Roach* v. *Garvan*, 1 Ves. Sen. 160.
(*p*) 15 & 16 Geo. V. c. 45, s. 6.
(*q*) *Andrews* v. *Salt*, L. R. 8 Ch. App. 622. See *Re Goldsworthy*, 2 Q. B. D. 75; 46 L. J. Q. B. 187; and the remarks of Brett, M.R., in *Re Agar-Ellis*, *Agar-Ellis* v. *Lascelles*, 24 Ch. D. 317, 387; 53 L. J. Ch. 10.
(*r*) Guardianship of Infants Act, 1895, s. 1.
(*s*) *Re M'Grath (Infants)*, [1893] 1 Ch. 143; 62 L. J. Ch. 208.
(*t*) See *Reg.* v. *Gyngall*, [1893] 2 Q. B. 242.
(*u*) *Talbot* v. *Earl of Shrewsbury* (*ubi sup.*).
(*x*) Guardianship of Infants Act, 1895, s. 1.
(*y*) *Anon.*, 2 Ves. Sen. 56, which is in direct opposition to *Storke* v. *Storke*, 3 P. Wms. 52.

exercise its discretion either in ordering the ward to be delivered up to the guardian, or in permitting him to reside with the mother, or in allowing her to have access to him (*z*).

Jurisdiction over Guardians Appointed by Court.—The power and jurisdiction of the Court over guardians appointed by itself is clear and undisputed. A guardian appointed by the Court is an officer of the Court, and responsible to it (*a*), and is little more than a bailiff or servant (*b*). Where there is a suit affecting an infant's property, whether he has been appointed by the Court or not, the guardian's powers of management can only be exercised subject to the control of the Court (*c*). When the Court has assumed authority over the person or property of the infant ward, it acts throughout with all the anxious care and vigilance of a parent, and it allows neither the guardian nor any other person to do any act injurious to the rights or interests of the infant. The Court has thus power to superintend the religious education of infants; it may settle in what faith they should be brought up, and may even order the discontinuance of their education in a particular religion if not to their detriment. The Court will interfere where there is a difference between the guardians as to the management of their ward, or as to the school to which he ought to be sent, or the person with whom he should reside, and generally as to the care and control of the word (*d*). It has power to order what sums should be expended for the maintenance and education of the infant wards out of their fortune, and the guardians must pass their accounts (*e*). Guardians will be prevented from taking wards of Court out of the jurisdiction, and their permanent residence abroad will not be permitted, except to their manifest advantage, as regards health and the like, and then only after leave obtained. The clandestine removal or attempt at removal of a ward of Court out of the jurisdiction is a gross contempt, and in its nature criminal, and visited with severe pains and penalties (*f*); to conceal or withdraw the person of the infant

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(*z*) *Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. 103; *Ex parte Earl of Ilchester*, 7 Ves. 348.

(*a*) *Wellesley* v. *Duke of Beaufort*, 2 Russ. & Myl. 639.

(*b*) See *Rex* v. *Sutton*, 3 A. & E. 597; 4 L. J. K. B. 215.

(*c*) *Webb* v. *Shaftesbury*, 7 Ves. 480; and see *Bethell* v. *Abraham*, L. R. 17 Eq. 24; 43 L. J. Ch. 180.

(*d*) *Duke of Beaufort* v. *Berty*, 1 P. Wms. 703; *Storke* v. *Storke* (*ubi sup.*); *Anon.* (*ubi sup.*).

(*e*) Dan. Ch. Pr. 1120; *Campbell* v. *Mackay*, 2 Myl. & Cr. 31; *Re Medley*, L. R. 6 Eq. 339.

(*f*) *Eyre* v. *Countess of Shaftesbury* (*ubi sup.*).

ward from the proper custody is likewise a contempt, and those who are aware of its place of concealment must divulge it (*g*). It is also a contempt to disobey the orders of the Court in relation to the maintenance and education of the ward, or to marry the infant without the consent of the Court.

The Court, of course, cannot be aware of the conduct of the large number of wards under its care, but in order to keep itself informed, it requires the guardians from time to time to give general information of what is taking place; and, whenever necessary, they ought to apply to the Court for advice and directions (*h*).

Where a guardian appointed by the Court does not behave to the satisfaction of the Court, orders regulating his conduct will be made upon him (*i*).

Appointment and Removal of Trustees.—There are various powers of appointment of trustees of the property of infants contained in the Acts of 1925. Under the Administration of Estates Act, 1925, where an infant is absolutely entitled under the will or on the intestacy of a person dying before or after January 1, 1926, to a devise or legacy or to the residue or any share therein, and there is no gift to trustees for the infant, the personal representatives of the deceased may appoint a trust corporation or two or more individuals not exceeding four (the personal representatives not being disqualified from inclusion) to be the trustee or trustees of such property for the purposes of the Settled Land Act, 1925, and on such appointment the personal representatives are discharged from responsibility (*k*). Under the Settled Land Act, 1925, if there are no trustees of a settlement, or where in any other case it is expedient that new trustees shall be appointed, the Court, on the application of the tenant for life, statutory owner, or any other person having under the settlement an interest or estate in the settled land, or in the case of an infant his testamentary or other guardian or next friend, may appoint fit persons to be trustees of the settlement (*l*). Upon the appointment of a new trustee a supplemental vesting order has to be executed containing a declaration that the persons therein named are the trustees for

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(*g*) *Ramsbotham* v. *Senior*, L. R. 8 Eq. 575; *Rosenberg* v. *Lindo*, 48 L. T. 478.

(*h*) *Kay* v. *Johnston*, 21 Beav. 536.

(*i*) 2 Fonb. Eq. Bk. ii. chap. ii. s. 1, note a; Macph. Inf. 119.

(*k*) 15 Geo. V. c. 23, s. 42.

(*l*) 15 Geo. V. c 18, s. 34.

the purposes of the Act (*m*), and a memorandum has to be endorsed on or annexed to the last or only principal vesting instrument in accordance with the Trustee Act, 1925. Under the Trustee Act, 1925, the appointment and discharge of trustees is dealt with in Part III. sections 35-40, and the powers of the Court are set out in Part IV., and it is provided that whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult or impracticable so to do without the assistance of the Court, the Court may make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular and without prejudice to the generality of the foregoing provision the Court may make an order appointing a new trustee in substitution for a trustee who is convicted of felony or is lunatic or a defective or is bankrupt or is a corporation which is in liquidation or has been dissolved. This power may in the case of a deed of arrangement be exercised either by the High Court, or by the Court having jurisdiction in bankruptcy in the district in which the debtor resided or carried on business at the date of the execution of the deed. An order under this section and any consequential vesting order or conveyance does not operate as a discharge to any former or continuing trustee any more than an appointment under any power contained in the instrument would have operated (*n*). Power to order remuneration is given in the case of the appointment of the Public Trustee or a corporation (*o*). The Court is also empowered to make a vesting order on the appointment of a new trustee where a trustee is under disability, or out of the jurisdiction, or cannot be found, or being a corporation is dissolved, also in case of uncertainty as to the survivorship of trustees jointly entitled, where the existence of a trustee is uncertain, where there is no personal representative or uncertainty exists as to who is the personal representative of a deceased trustee, or where a trustee entitled to any interest or contingent right has been required and has refused or neglected for twenty-eight days to convey the land or release the right to the person entitled (*p*).

Removal and Supersession of Guardians.—As a necessary incident of the power of the Court to control guardians and protect the interests of infants, it has the power to remove or supersede guardians. The Court has power to remove guardians

(*m*) 15 Geo. V. c. 18, s. 35.
(*n*) 15 Geo. V. c. 19, s. 41.
(*o*) *Ibid.*, s. 42.
(*p*) *Ibid.*, s. 43.

appointed by itself, and it also can remove or supersede those appointed by the infants themselves, and common law guardians, or guardians in socage. The ground for removal of the guardian is general unfitness for the trust reposed in him, whether it take the shape of actual breaches of trust, or gross personal misconduct on his part, and even suspicion of possible harm or loss to the ward will induce the Court to interpose on its behalf; thus if a guardian is shown to have caused, encouraged, or procured the seduction or prostitution of his infant ward under the age of sixteen, the Court may divest him of all control over her, and appoint some other person her guardian till she reaches majority (*q*). Becoming a lunatic or idiot, or being convicted of a serious criminal offence, would be a ground for removing a guardian. The application to remove a guardian of the person or estate should be made by summons, supported by evidence of the facts which render the application necessary (*r*).

Removal of Testamentary Guardians.—The control of the Court over testamentary guardians is clearly established, but the opinion prevailing down to recent times was that it had not the power (at any rate, it would not exercise it) to remove them. The reason for this was said to be the deference paid by the Court to the statute constituting their guardianship (*s*); thus, testamentary guardians were not removed, but superseded, and restrained from interfering with the infant's person or estate (*t*); the Court suspended their office by taking the wards out of their control and custody (*u*). But under the Guardianship of Infants Act, 1925, in the event of either parent of an infant objecting to the guardian appointed by the other, or if the guardian appointed by either parent considers that the mother or father is unfit to have the custody of the infant, the guardian may apply to the Court, and the Court may either refuse to make any order (in which case the mother or father shall remain sole guardian), or make an order that the guardian so appointed shall act jointly with the mother or father, or that he shall be sole guardian of the infant, and in the latter case may make any such order as to custody and the right of access thereto of the parent, as having regard to the welfare of the infant the Court

(*q*) 48 & 49 Vict. c. 69, s. 12. See *Hiscocks* v. *Jermonson*, 10 Q. B. D. 360; 52 L. J. M. C. 42.

(*r*) Dan. Ch. Pr. 1120.

(*s*) *Foster* v. *Denny*, 2 Ch. Cas. 237.

(*t*) *Ingham* v. *Bickerdyke*, 6 Madd. 275.

(*u*) Macph. Inf. 128. This renders it possible for them to be reinstated in their office.

may think fit, and may make an order for payment by the parent towards the maintenance of the infant (*x*). The Court can likewise make guardians give security for their proper conduct (*y*), or make orders regulating their conduct (*z*), and even punish them; thus, where one of two testamentary guardians of an infant girl about nine years old took her from a boarding-school and married her to his own son who had no fortune, the Court ordered the guardian to produce the girl in Court, and then committed her to the other guardian, and ordered an information to be brought against the guardian who married her to her disparagement. If the girl had been a ward of Court the guardian would have been committed to prison (*a*). When a testamentary guardian is superseded, a new guardian will be appointed to take charge of the ward's person and estate. The reason for superseding a testamentary guardian is the same as that for removing the other kinds of guardians, namely, general unfitness for the trust reposed in him, either because of personal misconduct (*b*), or because of his being in a position which would render it disadvantageous to the ward that he or his property should remain under his control. A testamentary guardian will be suspended for permitting his ward to contract an unfitting marriage (*c*); for tampering with the ward's religious views (*d*); a change of religion on the part of the guardian if likely to act to the detriment of the ward would be a ground of suspension (*e*); so where he becomes a lunatic (*f*), or insolvent, or bankrupt (*g*); he has also been suspended from his office where he has allowed his rights to lapse by acquiescence (*h*). Deliberately keeping the ward out of the jurisdiction would be a ground for removal or supersession, removal out of the jurisdiction without the leave of the Court being punishable as contempt of Court (*i*). Mismanagement of the ward's estate would be a ground for removing or superseding

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(*x*) 15 & 16 Geo. V. c. 45, s. 5.
(*y*) *Foster* v. *Denny* (*ubi sup.*).
(*z*) *Roach* v. *Garvan*, 1 Ves. Sen. 160.
(*a*) *Goodall* v. *Harris*, 2 P. Wms. 561.
(*b*) *Dillon* v. *Lady Mountcashell*, 4 Bro. P. C. 306.
(*c*) *Roach* v. *Garvan* (*ubi sup.*).
(*d*) *Di Savini* v. *Lousada*, 18 W. R. 425.
(*e*) *F.* v. *F.*, [1902] 1 Ch. 688; 71 L. J. Ch. 415. The Court should be slow to exercise its power in a case of this kind, and only the interests of the ward should be the guiding principle.
(*f*) *Ex parte Lady Anne Brydges*, cited 2 Fonb. Eq. 247 n.
(*g*) *Smith* v. *Bate*, 2 Dick. 631.
(*h*) *Andrews* v. *Salt*, L. R. 8 Ch. App. 622.
(*i*) *Hockley* v. *Lupin*, 1 Dick. 353; *Re J.* (*an Infant*), 108 L. T. 554.

him (*k*). But nothing short of such unfitness will deprive him of his rights; thus, he will not be superseded merely on account of his pecuniary interest in the death of his ward (*l*); nor is absence from the jurisdiction in itself a sufficient ground for supersession (*m*). What would be grounds for superseding a testamentary guardian in former days might now be grounds for removing him altogether (*n*).

A guardian may be superseded or removed by summons at chambers, for the purpose of appointing a new guardian in the room of the one sought to be removed or superseded (*o*).

Order for Production of Person of Ward.—In order to prevent guardians and trustees who have estates and interests in the lands and during the lives of their wards from continuing in possession of the lands after the death of the *cestui que trust*, any person claiming an estate in remainder, reversion or expectancy in or to any estate after the death of any such infant ward, on affidavit that he has cause to believe such infant to be dead, and that his or her death is concealed by such guardian or trustee, may, once a year, if he thinks fit, move for an order on the guardian or trustee to produce the person supposed to be dead; and may obtain an order to have the ward produced in Court or before commissioners; and on non-compliance the ward is to be taken to be dead, and the claimant may enter on his lands (*p*). If the ward is beyond sea the claimant may send over persons to view him (*q*). If the ward should be alive after such order is made, the ward may re-enter on his lands (*r*). If the guardian of the ward hold over after the determination of the life of the ward, the person entitled on the death of the latter to the land shall be entitled to recover the full value of the profits received during such wrongful possession (*s*). A person entitled on the death of the ward to an immediate contingent remainder may apply for an order (*t*); so, too, a person entitled under an executory devise may apply (*u*).

(*k*) *Lord Dudley's Case*, cited *Pomfret* v. *Windsor*, 2 Ves. Sen. 484.
(*l*) *Dillon* v. *Lady Mountcashell*, 4 Bro. P. C. 306.
(*m*) *Re Lewis*, 2 Moll. 485.
(*n*) 49 & 50 Vict. c. 27, ss. 6, 13.
(*o*) Dan. Ch. Pr. 1120. See Rule 6 of R. S. C. (Guardianship of Infants), 1887.
(*p*) 6 Anne, c. 18, s. 1.
(*q*) Sect. 2. (*r*) Sect. 3. (*s*) Sect. 5.
(*t*) *Ex parte Grant*, 6 Ves. 512.
(*u*) *Re Pople, Ex parte Baker*, 40 Ch. D. 589; 58 L. J. Ch. 372; and see *Re Stevens*, 31 Ch. D. 320; 55 L. J. Ch. 433.

CHAPTER IV.

TERMINATION OF GUARDIAN'S OFFICE.

Guardianship lasts only till Majority.—Perpetual tutelage is a thing unknown to the English law. When a man reaches an age when he is deemed by the law to be capable of managing his own affairs, he is loosed from the care and control of guardians. But where a person is not *compos mentis*, a curator or committee is generally appointed to look after his person or manage his affairs so long as his incapacity lasts. A person's property may be in the hands of trustees during his whole life, when trustees are appointed for the purpose of preserving or disposing of property in a particular manner as, for instance, to carry out the trusts of a marriage settlement, or to preserve the interests of remaindermen, or other interested parties. But, except in such instances, guardianship, according to English law, lasts only till the ward attains majority, or for the period for which it is fixed either by the law, or the person appointing, unless it is sooner determined.

How Terminated.—Guardianship may be terminated in various ways, which may be classified as follows: (1) By what may be termed natural limitations, such as (a) completion of the period for which it was instituted; (b) death of the ward; (c) death of the guardian. (2) By the act of the parties, such as (a) marriage of the ward; (b) marriage of a female guardian; (c) resignation of guardian.

(1) Natural Limitation.

(a) Completion of the Period.—The different kinds of guardianship end at various periods according to their nature. Guardianship in socage came to an end when the infant heir reached the age of fourteen. Testamentary guardianship under 12 Car. II. c. 24, s. 8, usually terminates when the ward reaches the age of twenty-one, but may end at an earlier period, if

provided for by the will appointing the guardian; thus, where a testator appointed his wife guardian of his children until her marriage, and the wife married again, her guardianship ceased (*a*). The Guardianship of Infants Acts, 1886 (*b*) and 1925 (*c*), make no express limitation except that the powers thereunder are conferred in respect of infants.

Chancery guardianship is put an end to by the ward arriving at the age of twenty-one.

(b) Death of Ward.—When the ward dies, the guardianship is, of course, brought to an end; and it only remains for the guardian to account for his trust with the heirs or the legal and personal representatives of the dead ward, if any.

(c) Death of Guardian.—Death of the guardian necessarily brings the guardianship of the particular guardian to an end, but not the wardship of the ward. Where there are co-guardians, the death of one of them has not the same effect in the case of testamentary and Chancery guardians Where one of two guardians appointed by testament dies, the survivor is entitled to continue in his office (*d*). Where one of two guardians appointed by the Court of Chancery dies, the right of the survivor determines, and it becomes necessary to apply again to the Court to make a new appointment (*e*); in the absence of any objection it is usual to re-appoint the survivor without a reference (*f*). Where the guardian in socage dies, the person next entitled to take upon himself the office would succeed.

(2) By Act of Parties.

(a) Marriage of the Ward.—The question whether the marriage of the ward puts an end to the wardship depends upon whether the ward is male or female, also whether the guardianship was testamentary or Chancery. If a male ward marries, neither as regards his person nor his estate would the powers of his testamentary or Chancery guardian be determined; at least it is clear that as regards his estate the functions of his guardian would not cease (*g*). Whether the guardianship of his person

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(*a*) *Selby* v. *Selby*, 2 Eq. Cas. Abr. 488.
(*b*) 49 & 50 Vict. c. 27.
(*c*) 15 & 16 Geo. V. c. 45.
(*d*) *Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. 103.
(*e*) *Bradshaw* v. *Bradshaw*, 1 Russ. 528.
(*f*) *Hall* v. *Jones*, 2 Sim. 41.
(*g*) See *Mendes* v. *Mendes*, 1 Ves. Sen. 91.

ceases is a more difficult question to answer. Marriage usually acts as an emancipation of the child, freeing him from parental control, and enabling him to act independently. If the child can then emancipate himself from his father's control by marriage, it would seem to follow that he could do so when he was only under a guardian, who has no greater rights than a parent. A father, however, voluntarily allows his son to be emancipated, but when a guardian is appointed by a father, his trust does not ordinarily expire till the ward has attained his majority; and for the guardian to allow him to emancipate himself by marriage might amount to a breach of trust on his part. It may, therefore, be said that the guardianship of a male ward does not terminate on his marriage.

The marriage of a female ward in Chancery does not determine the guardianship either of her person or property; for it is clear that the Court of Chancery would not allow itself to be ousted of its authority by an act of the parties which might amount to a contempt of its orders and jurisdiction. A female ward in Chancery, married or unmarried, is under the control of the Court both as to person and property till her period of wardship is put an end to by attaining majority. Whether the marriage of a female ward determines her testamentary guardianship seems to be a question yet awaiting judicial determination. In *Mendes* v. *Mendes* (*h*), Lord Hardwicke is made to use language supporting the contention that marriage of a female ward determines her wardship (*i*), but in the later case of *Roach* v. *Garvan* (*k*), Lord Hardwicke held that wardship was not determined by the marriage of a female ward, and that there was no precedent for the contention that it was determined; but his lordship added that the Court of Chancery had not been in the habit of appointing guardians to a married female infant, and that he would not do so. The better opinion is that the testamentary guardianship of female wards as regards their property is not determined by their marriage. This view may be perhaps strengthened by the operation of the legislation affecting married women, by which the rights and control of a husband over his wife's property are abrogated; accordingly, the claims of the husband over his wife's property (not settled

(*h*) 1 Ves. Sen. 91.

(*i*) *Eyre* v. *Countess of Shaftesbury* was given as the authority for this dictum, but there is nothing in the reports in 2 P. Wms. 103, or Gilb. Eq. Rep. 172, to support this proposition, and in the other report of *Mendes* v. *Mendes*, 3 Atk. 619, this dictum is not reported.

(*k*) 1 Ves. Sen. 160.

to her separate use) which were in conflict with those of her guardian can no longer afford a reason for holding that the claims of the husband on marriage bring about a practical determination of the testamentary guardianship. The only ground for holding her freed from the control of her guardian would be that as she is deemed fitted for performing the duties as head of a household and of a mother of a family, she ought to be deemed capable of managing her own property. Where a female ward marries a minor, it is only right and proper that her state of wardship should not be determined by her marriage. Notwithstanding that the balance of convenience in certain cases would permit her marriage with an adult to end her wardship, yet in the main the uniform rule that her marriage with an adult or minor shall have no effect on her status of ward, so far as her property was concerned, would be of greater advantage.

(b) Marriage of Female Guardian.—Under the common law, when a female guardian in socage married, her guardianship was practically determined, because her husband took upon himself *jure mariti* the office of guardian. But now, under the Married Women's Property Act, 1882 (*l*), marriage would give no such right to the husband to assume the office. In the case of a female testamentary guardian, her marriage does not put an end to her office; "if a *feme* guardian marry, the guardianship is not transferred to the husband, nor shall it be forfeited by the attainder or misdemeanour of the husband" (*m*). If the marriage of the testamentary guardian is likely to prejudice the interests of the ward, the Court now would supersede or remove the guardian (*n*). It ought to appear to the satisfaction of the Court that it would be to the ward's benefit to continue to reside with the married guardian (*o*). When a female guardian appointed by the Court of Chancery marries, her guardianship is suspended, and a reference as of course is made to inquire whether or not under the altered circumstances she should or should not be continued in her office; and where no harm is likely to ensue it is usual to confirm her appointment (*p*).

(c) Resignation of Guardian.—Guardianship in socage is a trust reposed in the next of kin by the law, and could not be

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(*l*) 45 & 46 Vict. c. 75, s. 24.
(*m*) Com. Dig. Gard. 384.
(*n*) 49 & 50 Vict. c. 27, ss. 2, 6, 13.
(*o*) *Jones* v. *Powell*, 9 Beav. 345.
(*p*) *Re Gornall*, 1 Beav. 347; *Jones* v. *Powell* (*ubi sup.*).

refused (*q*), nor resigned when acted upon. The socage guardian could not resign his office nor assign it (*r*); the guardian in socage has no interest of profit, it is an interest of honour . . . committed to the next of kin, and is therefore inherent in the blood, and cannot be assignable (*s*). Where testamentary guardians have accepted the office, it has been laid down that they will not be discharged of their trust upon their own application, and that the Court will compel them to act, because, being trustees, they cannot resign their office at will, and they will not be allowed to vacate it except for strong and urgent reasons (*t*). But as it cannot be for the infant's benefit to continue him in the care of a negligent or reluctant guardian, it is difficult to see how the Court can avoid transferring the custody and control of the ward to another; and, consequently, the Court has practically permitted the guardian to resign his trust (*u*), and appointed another guardian on the application of the infant for that purpose (*x*). But where a testamentary guardian has altogether declined to act, it is not necessary to remove him by a suit brought for that purpose, and it is sufficient to petition for the appointment of a new guardian (*y*). A guardian appointed by the Court of Chancery who accepts the office is a trustee, and cannot renounce or resign his trust, unless he obtain the sanction of the Court to lay down his office; for it would be unreasonable that having once undertaken the duties of guardian, he should be allowed at his own caprice to relieve himself of the burden, to the probable detriment of his ward. If he has valid grounds for retiring, he ought to seek the aid of the Court in releasing him from his obligations which he voluntarily assumed.

Guardianship cannot be Delegated.—For the like reason that guardianship is a trust and a personal confidence, a guardian, whether testamentary or appointed by the Court of Chancery, cannot delegate his duties and office to another. If he attempts to do so, his responsibility remains unaffected, and he must account with his ward as though he had not endeavoured to divest himself of his duties and liabilities (*z*).

(*q*) See *Bedell* v. *Constable*, Vaugh. 177.
(*r*) Statute of Marlbridge, 52 Hen. III. c. 17.
(*s*) Per Lord Commissioner Gilbert in *Eyre* v. *Countess of Shaftesbury*, Gilb. Eq. Rep. 172, 177.
(*t*) *Spencer* v. *Earl of Chesterfield*, Amb. 146.
(*u*) *Ibid.*
(*x*) *Ex parte Champneys*, 2 Dick. 350.
(*y*) *O'Keefe* v. *Casey*, 1 Sch. & Lef. 106.
(*z*) See *Turner* v. *Corney*, 5 Beav. 517.

CHAPTER V.

RIGHTS AND DUTIES OF GUARDIANS IN RESPECT OF THE PERSON OF THE WARD.

Right to Custody of Ward.—The parents of young children are pointed out by nature as their most proper guardians; when they are removed their place is taken by other guardians, who are required to act in all respects towards their wards like good and prudent parents. Guardians are entitled to the legal care and custody of their wards, not only as against the world at large, but as against the immediate relatives of the wards (*a*).

Remedies of Guardians.—In former days if the ward were taken out of the custody of the guardian, a writ of ravishment of ward lay against the wrong-doer (*b*); and the modern remedy is the writ of *habeas corpus* (*c*), or an application to the Court of Chancery (*d*).

To take a ward out of the custody of a guardian appointed by the Court of Chancery is a contempt of Court which can be punished by committal to prison. As in the case of natural parents, so in the case of guardians, the question of the care and custody of the person of the infant ward is in the discretion and under the control of the Court of Chancery, which it will freely exercise for the benefit and on behalf of the infant, either by ordering him to continue in or be restored to the custody of the guardian, or by permitting him to remain under the control of some other person. The Court will also exercise its discretion in matters appertaining to access to the infant ward.

(*a*) *Re Andrews*, L. R. 8 Q. B. 153; 42 L. J. Q. B. 99.

(*b*) 3 Edw. I. c. 22; 13 Edw. I. c. 35; Macph. Inf. 4.

(*c*) *Rex* v. *Greenhill*, 4 Ad. & El. 624; *Reg.* v. *Howes*, 30 L. J. M. C. 47; S. C. 3 L. T. 467; *Re Andrews*, L. R. 8 Q. B. 153; S. C. 42 L. J. Q. B. 99. On a writ of *habeas corpus* sued out by the guardian for the recovery of the ward, a common law Court, when the legal title of the guardian to the guardianship of the ward is made out, and the guardian is not an improper person for office, and the child too young to make a choice, can only make an order restoring the ward to the guardian, for the guardianship carries with it the legal custody of the ward; and no other question can be raised on the writ. Brett, M.R., in *Re Agar-Ellis*, *Agar-Ellis* v. *Lascelles*, 24 Ch. D. 317; 53 L. J. Ch. 10, doubted whether either Division of the High Court (Chancery or King's Bench) could entertain on the writ of *habeas corpus* any other question than the legal custody of the infant.

(*d*) See Part II., Parent and Child, chap. ii.

Testamentary Guardian and Mother or other Relatives.—A testamentary guardian has not now a superior claim to the mother to the care and custody of the ward; but if she clandestinely remove it from out of his custody, and the interests of the child would thereby suffer, she would be ordered to deliver the infant up to him (*e*). Though the Court will enforce the right of the guardian to the custody of the children as against their immediate relatives yet it looks with great anxiety to the execution of the duty belonging to the guardian, and the reasonable wishes of the natural parent (*f*). If a mother has obtained an order for the custody of her children under 36 Vict. c. 12, and the father dies appointing testamentary guardians for his children, her right to their custody would no doubt be held superior to that of the testamentary guardians not only up to the age of sixteen but to their majority (*g*). When the ward has attained to years of discretion, and is capable of exercising a choice, the Court will lend weight to his or her wish to reside with one guardian rather than another (*h*); and even to reside with one who is not a guardian, if harm is not likely to flow from the choice, and mere residence with another not in a tutorial capacity does not terminate the guardianship (*i*). But where the infant ward has not reached an age at which it can be deemed capable of exercising a wise choice, the Court will refuse to listen to expressions of choice made by the child (*k*). Thus the Court may order one of its wards to be delivered to his guardian, though he is old enough to exercise a discretion (*l*); or allow him to go at liberty (*m*); or allow him to remain in the circumstances in which he was at the date of the application to the Court (*n*).

Right to Change Domicil of Ward.—This point cannot arise with reference to wards of Court, because the Court of Chancery will not (as will be seen more particularly on a later page (*o*)), except for good reasons, permit its wards to be taken out of the jurisdiction. The great objection to changing the domicil of

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(*e*) See *Wright* v. *Naylor*, 5 Madd. 77.
(*f*) Per Eldon, L.C., in *Ex parte Earl of Ilchester*, 7 Ves. 348, 380.
(*g*) See Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27).
(*h*) *Storke* v. *Storke*, 3 P. Wms. 51.
(*i*) *Anon.*, 2 Ves. Sen. 374; *Bridget Hide's Case*, 3 Salk. 178. In the case of a female ward residing away from her guardian, recognizances would be taken that she should not be married without the leave of the Court.
(*k*) *Reg.* v. *Clarke*, 26 L. J. Q. B. 169.
(*l*) *Rochford* v. *Hackman*, Kay, 308.
(*m*) *Bond* v. *Roberts*, 13 Sim. 400.
(*n*) See *Harrison* v. *Goodall*, Kay, 310 n; *Re Lyons*, 22 L. T. 770.
(*o*) *Post*, Part IV. chap v.

the ward proceeds from the fact that the right of succession to the personal property of the ward may be affected considerably in favour of the guardian. A person under age being not *sui juris*, cannot acquire *proprio marte* a domicil for himself or herself. An infant's domicil is, during the lifetime of its father, the same as, and changes with, the domicil of the father. It has been held that where the father died, and the mother became guardian of her children, and she acquired a new domicil, and there was a complete absence of fraud in the change, her children's domicil changed with hers, even though her rights of intestate succession to the property of some of her deceased children were enlarged (*p*). It is now settled that if after the death of the father an unmarried infant lives with its mother, and the mother acquires a new domicil, it is communicated to the infant (*q*). Can a guardian, not a parent change the domicil of the ward? This question has never yet been put and answered in the English Courts; but the better opinion of English and foreign writers is that the guardian has not the power to change the domicil. Thus Story writes (*r*): "In the case of a change of domicil by a mere guardian, not being a parent, it is extremely difficult to find any reasonable principle on which it can be maintained that he can, by any change of domicil, change the right of succession to the minor's property." Dicey, in his work on Domicil, is of opinion that the Continental view, that the minor's domicil is fixed by the father's death, and cannot be changed during minority by the mother or guardian except by act of law, ought to prevail (*s*).

Difference between Rights and Duties of Parents and

(*p*) *Potinger* v. *Wightman*, 3 Mer. 67.

(*q*) Per Lord Campbell in *Johnstone* v. *Beattie*, 10 Cl. & F. 42.

(*r*) Conf. Laws, s. 506 n.

(*s*) Dom. p. 101 n. On p. 100 of the same work this learned writer has the following valuable observations: "It is possible that the domicil of an orphan follows that of his guardian. But whether this be so or not is an open question. In the first place, it may be doubted whether the rule is not rather that a ward's domicil can be changed, in some cases, by his guardian, than that it follows the domicil of his guardian. It is difficult to believe that the mere fact of D's guardian acquiring for himself a domicil in France, can deprive D, the son of a domiciled Englishman, of his English domicil. In the second place, the power of a guardian to change at all the domicil of his ward is doubtful. In the one recorded English case on the subject (*Potinger* v. *Wightman*), the guardian was also the mother of the children. As a matter of common sense, it can hardly be maintained that the home of a ward is, in fact, or ought to be, as a matter of convenience, identified with the home of his guardian in the same way in which the home of a child is naturally identified with that of its father. Should the question ever arise, it will probably be held that a guardian cannot change the domicil of his ward, and almost certainly that he cannot do this unless the ward's residence is as a matter of fact that of the guardian." See *Re Beaumont*, [1893] 3 Ch. 490; 62 L. J. Ch. 923.

Guardians.—Though the guardian is *in loco parentis* it is only in a modified sense. The guardian is not liable for necessaries supplied to his ward unless he has personally authorized their supply, and the mere fact of his knowing that his ward was in possession of the goods furnished would be insufficient to fix him with personal liability. If he has furnished his ward with necessaries, he will be allowed to recoup himself out of his ward's fortune and means. But if he permitted his ward to purchase that which was not a necessary, he and not the ward would be liable for the price of the goods. His position towards the ward is wholly fiduciary and temporary; he is under no legal liability to support him out of his own means, and as trustee he could make no profit out of his office by putting the ward out to service and taking his wages, though he might, under certain circumstances, be allowed to bind his ward out as an apprentice (*t*). So a guardian could not maintain an action for damages in his tutorial capacity for loss of services consequent upon a tort committed against his ward; thus, if a female ward were living in the house of her guardian and were seduced, he would not, it is submitted, like the father, or mother, or even aunt (*u*), be able to sustain an action for the seduction grounded on the loss of the services of the ward; because it would be impossible to uphold a constructive relation of master and servant between them. It might be otherwise if the actual relation of master and servant existed between the guardian and ward, and wages were paid for her services. If, after attaining her majority, the girl (no longer a ward) were to continue to live with her former guardian, rendering him slight services, and was seduced, it might be held that the relation of master and servant was sufficiently constituted to entitle him to maintain the action on account of the loss of services. It is quite clear that if the ward was not living in the house of her guardian, he could not bring this action.

Torts Committed by Ward.—If the ward commit a tort, to which in no respect was the guardian a party, the latter would not be held liable for it.

Duty of Guardian to Protect Ward.—It is an obvious duty on the part of a guardian to shield and protect the ward, and any breach of that duty which tends to the detriment of the child's health will be punished as a crime. Thus if any person

(*t*) *Rex* v. *Hindringham*, 6 T. R. 557.
(*u*) *Edmondson* v. *Machell*, 2 T. R. 4.

over sixteen years of age who has the custody, charge, or care of a child, under the age of sixteen, wilfully assaults, illtreats, neglects, abandons or exposes such child, or causes or procures such child to be assaulted, illtreated, neglected, abandoned, or exposed, in a manner likely to cause such child unnecessary suffering or injury to its health (including injury to or loss of sight or hearing or limb or organ of the body and any mental derangement), he is liable to be punished (*x*); and on his conviction or committal for trial for such offence, or any offence involving injury to the child, or being bound over to keep the peace towards such child, the child may be ordered to be taken out of his custody and given over to some person who is willing to undertake such charge (*y*). Again, where a guardian causes, encourages, or favours the prostitution of a female ward under sixteen, he may be divested of all authority over her (*z*), and the Court may appoint some person willing to take charge of her till she reaches majority or a less age (*a*).

Children Act, 1908.—If any person over the age of sixteen years, who has the custody of any child, wilfully assaults, neglects, abandons or exposes such child, or procures such child to be assaulted, neglected, abandoned or exposed in a manner likely to cause unnecessary suffering or injury to his health, such person shall be guilty of a misdemeanour and be punishable accordingly (*b*). Failure to provide adequate food, clothing, medical aid or lodging for the child or failing to apply for poor relief shall be deemed to be neglect. The obviation by another person of the suffering or injury does not prevent conviction. On proof that a person so convicted is directly or indirectly interested in any sum of money accruing or payable on the death of the child, and that the person had knowledge of the fact, the fine imposed may be increased from £100 to £200, and two years hard labour to five years penal servitude on indictment, and in the case of a summary conviction the Court has to take such interest and knowledge into consideration (*c*). The fact that the money was not legally payable to the person is immaterial, if he has any share in or any benefit from its payment (*d*). A Court of summary jurisdiction has power to bind over the parent or guardian of a girl under sixteen exposed to the risk of seduction or prostitution to enter into a recog-

(*x*) 4 Edw. VII. c. 15, s. 1.
(*y*) Sect. 6.
(*z*) See *Walker* v. *Laxton*, 70 L. T. 690.
(*a*) 48 & 49 Vict. c. 69, s. 12.
(*b*) 8 Edw. VII. c. 67, s. 12.
(*c*) *Ibid*, s. 12 (5).
(*d*) Sect. 12 (6).

nizance to exercise due care and supervision in respect of the girl (*e*).

As to the power of removal of an infant from the care of the person having its custody and committing an offence, and the appointment of a guardian in his place, see *ante*, ch. ii.

Duty of Guardian to Educate Ward.—The guardian is not only entitled to the control and custody of the ward, but also to regulate the mode and select the place of education of the ward. It is his duty to choose a proper school or place of education, and if he does so, and his ward refuses on no reasonable grounds to go there or stay there, the Court will compel him to obey his guardian's wishes (*f*). The Education Act of 1921 (*g*), compels the guardian to see that his ward receives a sufficient elementary education; but it is his duty to do more than that and to educate him in a manner suitable to his rank and expectations (*h*). In this respect the law requires more of the guardian than of the father; for the latter, if he keeps the education of his child in his own hands, is not bound to give him a better education than that insisted upon by the law; while the guardian would be committing a breach of his trust if he did not educate his ward in a manner which his station and fortune warranted (*i*).

Religion of the Parents.—The wishes of the parents as to the mode in which the ward is to be educated, and as to the religious faith in which it is to be nurtured, are to have all deference paid to them. The rule of the Court was that regard should be had to the religion of the father, whatever that religious faith may have been (*k*); and where a father appoints as testamentary guardian a person of his own religious faith, it is a clear intimation that he wishes his children to be brought up in his own faith (*l*). Where he has left no instructions as to the faith in which his children are to be educated the Court will presume that he intended they should be reared in his own faith (*m*). A mother's wishes, when they could be carried out, were also respected (*n*). The Guardianship of Infants Act, 1886, did not

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(*e*) Sect. 18.
(*f*) *Hall* v. *Hall*, 3 Atk. 721; see also *Tremaine's Case*, 1 Stra. 168.
(*g*) 11 & 12 Geo. V. c 51, s. 42.
(*h*) Per Lord Thurlow in *Powell* v. *Cleaver*, 2 Bro. C. C. 499, 510.
(*i*) See Part II., Parent and Child, chap. ii. p. 526.
(*k*) *Re Kaye*, L. R. 1 Ch. App. 387.
(*l*) *Talbot* v. *Earl of Shrewsbury*, 4 Myl. & Cr. 672.
(*m*) *Hawksworth* v. *Hawksworth*, L. R. 6 Ch. App. 539.
(*n*) See *Re Kaye*, L. R. 1 Ch. App. 387.

alter this right of the father to decide in what religious faith his children should be brought up, though under the Act the surviving mother became guardian and was of a different religious faith to that of the father (*o*). But, on the other hand, where the father died without such instructions, and there were strong indications that he had abandoned his right to have them educated in his own faith, the Court would direct that those in control of them should bring them up in that religion in which their father during his lifetime permitted them to be educated (*p*). No pecuniary benefit to the infant will sway the Court one way or the other, for the religious faith in which a child is to be brought up is no matter of barter in the Court (*q*). At one time the Court refused to admit parol proof of the intention of the wishes of the father, whether he left testamentary guardans or not (*r*); but the practice was soon changed, and Lord Hardwicke admitted parol evidence of the intentions of the father (*s*), and since his time it has always been the practice to gather the wishes and intentions of the parent from any available trustworthy source (*t*). If the mother has abandoned any rights she might have possessed, her power to control the education of the child is lost.

In making an order under the Children Act, 1908 (*u*), committing the care of a child to a guardian other than the parent, the Court is directed when determining on the person to be selected, to ascertain the religious persuasion to which the child belongs and to select a person of the same religious persuasion, or obtain an undertaking that the child shall be brought up in accordance with its own religious persuasion.

The House of Lords laid down that on the question of religion the welfare of the child forms the paramount consideration. The wishes of the father are to be considered, and if there is nothing else to take into account the wishes of the father prevail, but if a sufficient case is made out for going contrary to the father's wishes the Courts do not hesitate to do so (*x*).

(*o*) *Re Scanlan (Infants)*, 40 Ch. D. 200; 57 L. J. Ch. 718.
(*p*) *Re Clarke*, 21 Ch. D. 817; 51 L. J. Ch. 762.
(*q*) Per Lord Cottenham in *Talbot* v. *Earl of Shrewsbury (ubi sup.)*.
(*r*) *Storke* v. *Storke*, 3 P. Wms. 51.
(*s*) *Anon.*, 2 Ves. Sen. 56. This case was decided twenty years after *Storke* v. *Storke*.
(*t*) See *Re Clarke (ubi sup.)*.
(*u*) 8 Edw. VII. c. 67, s. 23 (1).
(*x*) *Ward* v. *Laverty*, [1924] 2 Ir. 122; 59 L. J. 200.

Under the Guardianship of Infants Act, 1925, the Courts are directed not to consider any question as to the upbringing of an infant from any other point of view than the welfare of the infant, and not to consider that the claim of the father or any common law right possessed by the father is superior to that of the mother (*y*). The point of view from which the welfare of the child is considered especially in regard to any attempt to change the religious views of a child old enough to have definite views is explained fully in *Re McGrath* (*z*) and in *Reg.* v. *Gyngall* (*a*).

Differences between Guardians.—Where there is any difference between the guardians as to the mode of educating their wards, they should at once apply to the Court, which will give directions (*b*). But the Court will exercise its own discretion in the matter, and will not consider itself bound by their wishes (*c*).

Duty of Guardian in Respect of Marriage of Ward.—A guardian should act in respect of the marriage of his ward like a good and prudent parent, and in every way endeavour that the marriage should be one befitting the rank, fortune, and expectations of the ward. It is his duty to prevent improper unions, and if he deems himself unable to prevent mischief, he should apply to the Court of Chancery for assistance, which will be afforded him if necessary (*d*). If the guardian (even a testamentary one) connive at an intended unequal marriage of his ward, the Court will interfere, and intrust the ward to the custody of another, more likely to do justice by him (*e*). A guardian of a ward of Court is an officer of the Court and directly under its control, and must report to the Court the fact that its ward is contemplating a marriage. He must use every means of discouraging an unsuitable connection. The guardian's consent to the marriage of a ward of Court is insufficient, and a marriage with only his consent does not render it less a contempt, unless the leave of the Court be first obtained; it is equally a contempt in the case of an attempted marriage. The grounds for the interference of the Court are more fully set out in the chapter on Wards of Court (*f*).

(*y*) 15 & 16 Geo. V. c. 45, s. 1.
(*z*) [1893] 1 Ch. 143; 62 L. J. Ch. 208.
(*a*) [1893] 2 Q. B. 232; 62 L. J. Q. B. 559.
(*b*) Guardianship of Infants Act, 1925, c. 45.
(*c*) Macph. Inf. 121; *Storke* v. *Storke* (*ubi sup.*).
(*d*) *Lord Raymond's Case*, Cas. t. Talb. 58.
(*e*) *Vernon* v. *Vernon*, cited in *Lord Raymond's Case* (*ubi sup.*).
(*f*) See *post*, Part IV., Infancy, chap. v. For consent of guardians, see Part I., Husband and Wife, chap. iv.

Maintenance and Advancement of Infants.

Maintenance.—Except in the case of the natural guardians, the father and mother, there is no legal liability or duty to support and maintain the ward cast upon the guardian; the latter is in no way bound to take his own means to support the ward. If the ward has a fortune or means which can be devoted to his support and maintenance, it is a sufficient discharge of his duty and trust if the guardian properly and duly apply them to the purposes for which they are available, and in the event of the trustees refusing to exercise their discretion the Court has jurisdiction to give directions as to the proper exercise of it (*g*). Sanctioning payments for the maintenance and advancement of infants forms a large and important portion of the jurisdiction of the Court of Chancery.

Application of Income of Property of Infant.—In regard to wills coming into operation on and after January 1, 1926, the Law of Property Act, 1925 (*h*), provides that a contingent or future specific devise or bequest of property, whether real or personal, and a contingent residuary devise of freehold land, and a specific or residuary devise of freehold land, to trustees upon trust for persons whose interests are contingent or executory, shall, subject to the statutory provisions relating to accumulations, carry the intermediate income of that property from the death of the testator, except so far as such income, or any part thereof, may be otherwise expressly disposed of. The following observations apply as they stand to the income of interests under wills coming into operation before January 1, 1926, but in regard to later wills are subject to the qualifications introduced by this enactment.

(a) Maintenance under Wills coming into Operation before January 1, 1926.—Where an infant has property of his own, and his father is dead or is not able to support him, he may be maintained out of the income of his property (if his interest in it be absolute), by the person in whose hands the property is, or a stranger may maintain him; and a Court of equity will allow all payments made for this purpose, which can be shown to have been proper and reasonable (*i*). The Court of Chancery has full control over the property of infants, whether real or personal,

(*g*) *Re Cooper, Cooper* v. *Cooper*, [1913] 1 Ch. 350.
(*h*) 15 Geo. V. c. 20, s. 175.
(*i*) Macph. Inf. 213.

and has authority to give maintenance to infants out of their property, in some cases even where their interest is only contingent, or where accumulation is expressly directed; to refuse to allow maintenance, even if given by the instrument of donation, and to ascertain and fix the amount to be allowed, whether placed in the discretion of third parties or not; to direct to what persons maintenance shall be paid, and to control the application of it (*k*). The Court has power to allow maintenance, though there is no suit before it (*l*).

The fact of the father or the mother of the infant being alive does not affect its right to be maintained out of its own property; thus, where infant children after the death of their father petitioned for an allowance of maintenance out of their fortunes, maintenance was determined irrespective of the means of their mother to support them out of her fortune (*m*). The sum granted by way of maintenance is always in the discretion of the Court, and relative to the fortune and position in life of the infant (*n*), and the poverty or wealth of his father or mother (if any) (*o*). If the guardian is in any doubt as to what amount should be devoted to the maintenance of the infant, he should apply to the Court for directions. This does not relieve the father and mother from their statutory liability to maintain their infant children, but rather enables the children to be brought up and educated in a manner which their expectations reasonably warrant (*p*). The Court will not make an allowance to a parent for the maintenance of a child for the time past, although it appear that, in fact, he had not been of ability to maintain him, and although the will expressly gave the produce of a fund to trustees for his maintenance (*q*). And where the infant had no property except a reversionary interest in real estate expectant on the death of a lady aged 85, leave to raise money on loan was refused (*r*).

Before the Court can order maintenance to be allowed there must be a clear fund which can be devoted to that purpose.

(*k*) Simp. Inf. 261.
(*l*) *Ex parte Kent*, 3 Bro. C. C. 88; *Ex parte Salter*, *ibid.* 500.
(*m*) *Douglas* v. *Andrews*, 19 L. J. Ch. 69.
(*n*) *Harvey* v. *Harvey*, 2 P. Wms. 22.
(*o*) *Roach* v. *Garvan*, 1 Ves. Sen. 160.
(*p*) See *post*, p. 672 *et seq.*
(*q*) *Andrews* v. *Partington*, 2 Cox, Eq. Cas. 223; *Hill* v. *Chapman*, 2 Bro. C. C. 231. Under what circumstances the father will be allowed a sum for maintenance out of his children's fortune, see *post*, p. 673 *et seq.*
(*r*) *Re Badger*, *Badger* v. *Badger*, [1913] 1 Ch. 385; 82 L. J. Ch. 264.

Such fund may be the rents and profits of real estate (*s*), or the income of personal property (*t*). If the rents are insufficient to keep down charges on the property, maintenance out of them will not be granted (*u*); nor out of the income of personal property, unless the Court is satisfied that it is clear from incumbrances and claims against it (*x*).

Interest must be Vested in Possession.—Again, the interest of the donee of the fund must be vested in possession. The vesting of an interest depends upon the construction of the instrument creating the gift; where the donee takes an immediate interest in the fund, whether the rents and profits of real estate or a legacy, no question as to its vesting, and his being entitled to the income can well arise; but where the gift is dependent upon the happening of some contingency, as upon the donee attaining a certain age, it may be more difficult to determine whether the gift is vested in possession or not. It may be stated as a general rule, that where it can be gathered from the words of the instrument of donation that the donee is to take the intermediate income of a legacy contingent upon the happening of a particular event, his interest in the fund is vested in possession (*y*), for in such a case the gift of the entire intermediate income accelerates the vesting, and makes it immediate (*z*); so the giving of maintenance may effect a vesting of the fund in possession (*a*); but this gift of maintenance only vests the fund in possession where it is the gift of the whole income derived from the fund (*b*).

Gift of Income Vests the Legacy.—Thus, where the trustees have a discretion to apply less than the whole of the intermediate income in the maintenance of the infants, there is vesting in possession by the mere fact that the infants may be maintained out of the income (*c*). It is the giving the income which is held to effect the vesting of the legacy, and not the giving

(*s*) *Re Howarth*, L. R. 8 Ch. App. 415; 42 L. J. Ch. 316; but see *Cadman* v. *Cadman*, 33 Ch. D. 397; 55 L. J. Ch. 833.

(*t*) *Ramon* v. *Ramon*, 39 L. T. 552.

(*u*) *Pearce* v. *Brooks*, cited Chamb. Inf. 257.

(*x*) *Warter* v. ——, 13 Ves. 92; *Wear* v. *Wilkinson*, cited in *Warter* v. ——.

(*y*) *Hanson* v. *Graham*, 6 Ves. 239.

(*z*) *Re Byrne*, 23 L. R. Ir. 260.

(*a*) *Pulsford* v. *Hunter*, 3 Bro. C. C. 416; *Fox* v. *Fox*, L. R. 19 Eq. 286; *Re Bunn*, *Isaacson* v. *Webster*, 16 Ch. D. 47; *Re Turney*, *Turney* v. *Turney*, [1899] 2 Ch. 739; 69 L. J. Ch. 1.

(*b*) *Spencer* v. *Wilson*, L. R. 16 Eq. 501.

(*c*) *Re Grimshaw's Trusts*, 11 Ch. D. 407; 48 L. J. Ch. 399; *Dewar* v. *Brooke*, 14 Ch. D. 529; 49 L. J. Ch. 374; *Re Wintle*, *Tucker* v. *Wintle*, [1896] 2 Ch. 711; 65 L. J. Ch. 863. In these cases *Fox* v. *Fox* (*ubi sup.*) was either distinguished or dissented from.

maintenance; but when maintenance is given, questions arise whether it be a distinct gift, or merely a direction as to the application of the income; and if it be a distinct gift, it has no effect upon the question of the vesting of the legacy (*d*). Thus, a separate and distinct gift of maintenance, though it may equal in amount the income, will not vest the fund in possession (*e*). It is, however, the severance of the fund by the direction of the testator that carries the income; therefore, where a fund is set aside by executors merely because the rest of the estate has become distributable, it does not carry the income (*f*). The mere fact that the vested interest of the donee is defeasible in a certain event by a condition subsequent will not disentitle him to the income of the fund, and he will be entitled to maintenance till the happening of the event (*g*), even in spite of a direction to accumulate (*h*). But a contingent bequest of chattels real, or other personalty not being residuary personalty, where the subject-matter of the gift is not directed to be set apart from the rest of the estate, will not carry the intermediate income (*i*); though where a specific legacy is vested at once in the legatee, but the enjoyment only is postponed, the legatee is entitled to the intermediate income (*k*). So where a fund is appointed but the enjoyment of it is postponed, it will carry intermediate income (*l*). It has been laid down as the practice of the Court of Chancery that an infant who is entitled under the will of his parent to a legacy contingently on his attaining twenty-one is entitled to maintenance during his minority out of the income of the legacy; but does not acquire an immediate vested interest in the income, and if he dies under twenty-one the surplus income not applied for maintenance does not pass to his representatives (*m*).

Real Estate.—The same principle is applicable to residuary devises; thus, a future residuary devise, or a devise subject to

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(*d*) Per Cottenham, L.C., in *Watson* v. *Hayes*, 5 Myl. & Cr. 125, 133.
(*e*) *Watson* v. *Hayes* (*ubi sup.*).
(*f*) See *Festing* v. *Allen*, 5 Ha. 573; *Re Inman*, *Inman* v. *Rolls*, [1893] 3 Ch. 518.
(*g*) See *Taylor* v. *Johnson*, 2 P. Wms. 504; *Barber* v. *Barber*, 3 Myl. & Cr. 688.
(*h*) *Stretch* v. *Watkins*, 1 Madd. 253.
(*i*) *Guthrie* v. *Walrond*, 22 Ch. D. 573; 52 L. J. Ch. 165; per Kay, L.J., in *Re Woodin*, *Woodin* v. *Glass*, [1895] 2 Ch. 309; 64 L. J. Ch. 501.
(*k*) *Re Woodin*, *Woodin* v. *Glass* (*ubi sup.*).
(*l*) *Long* v. *Ovenden*, 16 Ch. D. 691; 50 L. J. Ch. 314.
(*m*) *Re Bowlby*, *Bowlby* v. *Bowlby*, [1904] 2 Ch. 685; 73 L. J. Ch. 810; practically overruling *Re Scott*, *Scott* v. *Scott*, [1902] 1 Ch. 918; 71 L. J. Ch. 475.

prior limitations which may or may not take effect, will not carry the intermediate rents and profits (*n*).

Where Payment Postponed.—Where the gift is vested, but the payment of it is deferred until a fixed future day, maintenance will not be allowed out of it, because it does not carry the income until the arrival of the day of payment; nor will it be allowed where the gift of residue is contingent, for the income must accumulate until the happening of the contingency (*o*).

Where Legacy Carries Income.—But to this rule there are exceptions; where the donor of the fund is a parent, or *in loco parentis*, and the donee is unprovided for. The Court in this case acts upon the supposition that the parent, or the person who has put himself in the position of a parent, means the child to be supported notwithstanding the postponement of the vesting of his interest (*p*); thus, in the case of real estate, where the rents are insufficient to keep down the incumbrances, the Court will not suffer in favour of the remainderman all the surplus profits to be exhausted to discharge the interest in exoneration of the estate, and leave the heir-at-law to starve (*q*); so, too, in the case of personal estate, as where a legacy is vested, but not payable till a future day; in such a case the child has an immediate right to the income of the money (*r*). The true view of the practice of the Court has been laid down to be that the infant is entitled, not to the income of such a legacy, but only to maintenance thereout (*s*). This is equally the case where the legacy is contingent, though there is no direction as to income, but there is as to maintenance (*t*); and it applies to a legacy or portion charged on land whether vested and payable *in futuro* (*u*), or contingent (*x*). But where the testator (whether father or person *in loco parentis*) has provided a fund for the support and maintenance of the child, the latter will not be

(*n*) *Hodgson* v. *Earl of Bective*, 1 H. & M. 376; *Wade-Gery* v. *Handley*, 3 Ch. D. 374; 45 L. J. Ch. 712.

(*o*) *Butler* v. *Freeman*, Amb. 303; *Gotch* v. *Foster*, L. R. 5 Eq. 311.

(*p*) *Harvey* v. *Harvey*, 2 P. Wms. 21; *Incledon* v. *Northcote*, 3 Atk. 430; *Donovan* v. *Needham*, 15 L. J. Ch. 193.

(*q*) *Revel* v. *Watkinson*, 1 Ves. Sen. 93.

(*r*) *Green* v. *Belcher*, 1 Atk. 507; *Heath* v. *Perry*, 3 Atk. 101; *Crickett* v. *Dolby*, 3 Ves. 10; *Wilson* v. *Maddison*, 12 L. J. Ch. 420. If the infant is *en ventre sa mère* at the testator's death interest runs only from its birth, *Rawlins* v. *Rawlins*, 2 Cox, 425.

(*s*) Per Cozens Hardy, L.J., in *Re Bowlby, Bowlby* v. *Bowlby*, [1904] 2 Ch. 713; 73 L. J. Ch. 810.

(*t*) *Chambers* v. *Goldwin*, 11 Ves. 1; *Martin* v. *Martin*, L. R. 1 Eq. 369.

(*u*) *Green* v. *Belcher* (*ubi sup.*).

(*x*) *Incledon* v. *Northcote* (*ubi sup.*).

entitled to intermediate interest on the contingent legacy, the presumption of its carrying interest by way of maintenance being rebutted (*y*); though where a parent or person *in loco parentis* leaves a legacy to an infant legatee which is not contingent, such legacy carries interest by way of maintenance from the death of the testator, notwithstanding that the will contains a provision for the maintenance of the child out of the income of the legacy, or out of the income of a share of residue given to him equally with the other children, such share of residue not being deemed to be "another fund" (*z*).

The ground of this exception has been thus stated: "In the instance of a child, the Court does not postpone the payment of interest till a year after the death of a parent, for the Court considers the parent to be under an obligation to provide not only a future but a present maintenance for his child, and therefore holds that he could have postponed the time of payment only from the incapacity of the child to receive, but that he never meant to deprive him of the fruit of the legacy, which fruit is the only maintenance, and which maintenance he was bound to provide" (*a*). There does not seem to be any reason, in view of recent legislation, why the gift of a mother, whether a widow or not, who has become liable for the support of her children, should not be affected by the above rule, and the exception; and it is probable that the Courts will construe the devises and legacies of a mother to her children as being *in pari jure* with those of a father (*b*). The above practice of the Court of Chancery must be read in connection with the large powers of maintenance given to trustees under the provisions of the Conveyancing and Law of Property Act, 1881 (*c*), and the Trustee Act, 1925.

Persons in loco parentis.—A person *in loco parentis* is one who means to put himself in the situation of a father in reference to the duty of providing for the infant beneficiary (*d*). Where the child resides with a father and is maintained by him, that fact contains an inference, though not a conclusive one, that the donor did not intend to place himself *in loco parentis* (*e*). This

(*y*) *Hearle* v. *Greenbank*, 3 Atk. 717; *Re George* (*an Infant*), 5 Ch. D. 837. In this case it was held that interest by way of maintenance was presumed unless rebutted.

(*z*) *Re Moody, Woodroffe* v. *Moody*, [1895] 1 Ch. 101; 64 L. J. Ch. 174.

(*a*) Per Lord Alvanley in *Crickett* v. *Dolby*, 3 Ves. 13.

(*b*) See *Fowkes* v. *Pascoe*, L. R. 10 Ch. 343; 44 L. J. Ch. 367; *Re Orme, Evans* v. *Maxwell*, 50 L. T. 51.

(*c*) See *post*, pp. 668 *et seq.*

(*d*) *Ex parte Pye*, 18 Ves. 140; *Powis* v. *Mansfield*, 3 Myl. & Cr. 359.

(*e*) *Parsons* v. *Peters*, 11 Jur. (N.S.) 150.

exception holds good not only where the gift is to a child *nominatim*, but also to children as a class (*f*). But the child must be unprovided for by the father or person *in loco parentis* the whole or part of his minority, for "the implication is rebutted if he provides any maintenance for the child, however small the maintenance, and however large the legacy" (*g*).

Gift to a Class.—Another exception is where there are equal legacies to a class of children (even with a direction for accumulation), some of whom must eventually take the benefit of the legacies. The Court under these circumstances, the chances of all or the survivor taking being equal, will take the fund and maintain all out of the interest, even though the donor is a stranger (*h*). This rule has been styled "the allowance of maintenance on the principle of compensation," for the "Court if it can collect before it all the persons who may be entitled to the fund, so as to make to each a compensation by the immediate maintenance given, for the diminution of the fund to which he may eventually become entitled, will maintain them all out of the interest" (*i*). If the members of the class take vested interests at birth in a fund which carries intermediate income, such income is divisible among those members of the class who are for the time being in existence, but only as from the date of the birth of each (*k*).

Where Gift over to Stranger.—This principle will not be applied where the property is not given absolutely to the children and the survivor, but in certain events there is a gift over to a stranger (*l*) (whether such stranger is to take in substitution (*m*), or as a residuary legatee (*n*), or as a next of kin (*o*)), unless the Court can procure the consent of all persons interested in the remainder (*p*). The issue of a child dying under age have been considered strangers (*q*); so, too, a sister whose interest under a will was different from that of her brothers

(*f*) *Incledon* v. *Northcote*, 3 Atk. 430; *Brown* v. *Temperley*, 3 Russ. 263.
(*g*) Per Lord Redesdale in *Ellis* v. *Ellis*, 1 Sch. & Lef. 1, 5.
(*h*) *Marshall* v. *Holloway*, 2 Swanst. 436. This exception is said to be a practice of the Court only, and does not enable trustees to apply the income when the estate is not under administration; *Re Breeds' Will*, 1 Ch. D. 226; 45 L. J. Ch. 191. See *Re Holford*, *Holford* v. *Holford*, [1894] 3 Ch. 30; 63 L. J. Ch. 637.
(*i*) Macph. Inf. 225. See the cases collected in Simpson on Infants, 274—283.
(*k*) *Shepherd* v. *Ingram*, Amb. 448; Theo. Wills, 147.
(*l*) *Ex parte Kebble*, 11 Ves. 604.
(*m*) *Greenwell* v. *Greenwell*, 5 Ves. 194.
(*n*) *Haughton* v. *Harrison*, 2 Atk. 329.
(*o*) *Cannings* v. *Flower*, 5 L. J. Ch. 8.
(*p*) *Cavendish* v. *Mercer*, 5 Ves. 195 n.
(*q*) *Turner* v. *Turner*, 11 Ves. 606. See also *Errington* v. *Chapman*, 12 Ves. 20.

and sisters, was deemed a stranger (*r*). When the Court can obtain the consent of the parties in whose favour the gift over is made, then it will order maintenance to be allowed (*s*). Thus, while the Court has power to make an allowance for maintenance beyond that provided by the will of the testator, it yet will direct that the interests of third parties, who may become entitled to the fund out of which the increased allowance has been made, shall be protected by holding the interests of the infants as security for the amount of such increased allowance (*t*). It is now usual where the infant is allowed maintenance out of a contingent legacy (the infant not being entitled to maintenance by the will of the testator), to secure the interests of those entitled over by insuring the life of the infant to an amount which will cover the advances made by way of maintenance (*u*). Where there is no legal estate vested in the trustees who are to apply part of an infant's presumptive share of real estate in maintaining him, yet they have a legal power to enter upon the devised lands and take sufficient profits to enable them to carry out the express power of maintenance (*x*).

Directions as to Income.—Where the *corpus* of a contingent legacy is directed to be set apart by a testator for the purpose of meeting the legacy, then maintenance can be allowed out of the income derived from the invested fund (*y*). But if there is an absolute discretion in the trustees to devote the income to be derived from the invested fund to the maintenance of the infant legatees, no one infant has a vested interest in the fund till the happening of the contingency which vests the fund in all (*z*).

Maintenance will, if necessary, be allowed if given by the instrument of donation (*a*), whether the gift is vested (payment being postponed (*b*)), or contingent (*c*). And even where there is a gift over, maintenance will be allowed if it can be fairly inferred that the testator intended to give it (*d*).

(*r*) *Ex parte Kebble* (*ubi sup.*). (*s*) *Cavendish* v. *Mercer* (*ubi sup.*).
(*t*) *Re Colgan* (*Infants*), 19 Ch. D. 305; 51 L. J. Ch. 180.
(*u*) *Re Arbuckle*, 14 L. T. 538; 2 Set. Judg. & Ord. 849, where the form of the order for maintenance, and directions for insurance of the life of the infant as an indemnity, is set out. *De Witte* v. *Palin*, L. R. 14 Eq. 251.
(*x*) *Dean* v. *Dean*, [1891] 3 Ch. 150; 60 L. J. Ch. 553.
(*y*) *Re Medlock, Ruffle* v. *Medlock*, 55 L. J. Ch. 738; *Re Judkin's Trusts*, 25 Ch. D. 743; 53 L. J. Ch. 496; *Re Dickson, Hill* v. *Grant*, 29 Ch. D. 331; 54 L. J. Ch. 510; *Re Burton's Will, Banks* v. *Heaven*, [1892] 2 Ch. 38; 61 L. J. Ch. 702; *Re Clements, Clements* v. *Pearsall*, [1894] 1 Ch. 665; 63 L. J. Ch. 326; *Re Woodin, Woodin* v. *Glass*, [1895] 2 Ch. 309; 64 L. J. Ch. 501.
(*z*) *Re Coleman, Henry* v. *Strong*, 39 Ch. D. 443; 55 L. J. Ch. 283.
(*a*) Simp. Inf. 284. (*b*) *Hall* v. *Carter*, 2 Atk. 354.
(*c*) *Ellis* v. *Maxwell*, 10 L. J. Ch. 266.
(*d*) *Lambert* v. *Parker*, G. Coop. 143.

Gift of Income for Maintenance.—Where a person is by the terms of the instrument of donation the donee of income for the maintenance of children, he will be entitled to receive it for that purpose so long as he continues properly to maintain them (*e*). And when he has a discretion to exercise, he must exercise it in a fair and honest manner, and if by his conduct he incapacitates himself from performing the trust he will be entitled only to a share for his own maintenance (*f*); thus, a mother, though maintaining and educating her children, who lives in a state of concubinage with her paramour does not perform properly the trust reposed in her (*g*). Where a gift of income for the maintenance of a child is subject to conditions, the conditions must be observed, as where a voluntary settlement provided that no part of the income was to be applied for the benefit of the infant while in the custody of his father, or while the father had anything to do with the education or bringing up of the infant, the clause was held not to be contrary to public policy, and the father declining to give up the custody, the trustees had no discretionary power which they could exercise (*h*).

Where a fund is given to a person impressed with a trust for maintenance, it may properly be paid over to the donee, who is accountable for the right application of it, but cannot be made assignable for the benefit of his creditors without regard to the interests of the children (*i*); but no account will be demanded of such a trustee unless it can be specifically shown that he has improperly disbursed it (*k*); and an honest exercise of discretion will not be interfered with (*l*).

This question, whether a gift to a person for the purpose of maintaining his children is an absolute gift of the devise, or constitutes the donee only a trustee of the fund on behalf of the children who become beneficially interested in it, not

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(*e*) *Hadow* v. *Hadow*, 9 Sim. 438. Where income of property is given to a widow for the maintenance and support of herself, and the maintenance, education, and support of her children, *prima facie*, and in the absence of express directions, children living with her are intended, and not married daughters or adult sons (*Carr* v. *Living*, 28 Beav. 644), more especially where such have become forisfamiliated, and set up independent homes for themselves. See *Thorp* v. *Owen*, 2 Ha. 607.

(*f*) *Castle* v. *Castle*, 1 De G. & J. 352.

(*g*) *Re G.* (*Infants*), [1899] 1 Ch. 719; 68 L. J. Ch. 374.

(*h*) *Re Borwick's Settlement*, *Woodman* v. *Borwick*, [1916] 2 Ch. 304; 85 L. J. Ch. 732.

(*i*) *Wetherell* v. *Wilson*, 1 Keen, 80. See *Brown* v. *Casamajor*, 4 Ves. 498; *Hamley* v. *Gilbert*, Jac. 354.

(*k*) *Hora* v. *Hora*, 33 Beav. 88.

(*l*) *Raikes* v. *Ward*, 1 Ha. 445.

infrequently arises. The answer must, of course, depend to a great extent on the construction of the instrument creating the gift. Where income is given to a parent for the support and maintenance of his children, the parent is deemed only to be a trustee (*m*), so if the parent die during the minority of the child, the income will still be payable for his support, unless the donor makes the payment cease on the death of the parent (*n*). Where the fund itself is given, the presumption is that an absolute gift was intended (*o*), and this must be rebutted by words clearly expressive of a trust. Mere words of direction, as that the fund should be employed for the maintenance of children, will be deemed to express the motive of the testator rather than to create a trust. The presumption in favour of a gift being intended is much stronger in the case of a father than a mother, for when a fund is given in aid of the performance of a duty which the donee is already legally bound to perform, it is a gift to and a beneficial interest in the person to whom it is made (*p*). But the effect of the Married Women's Property Act, 1882, is to equalise this presumption, or at any rate to materially modify it. In the case of a gift from a testator to his widow for the support of her children, the presumption in favour of its being an absolute gift is very strong. Thus, where a testator by his will desired that everything during the life of his wife should remain as it was for her use and benefit, and after his decease he gave his real estate to his male heir, and his personal estate to his children, adding, "I give the above devise to my wife that she may support herself and her children according to her discretion, and for that purpose," it was held that the widow took an absolute interest for her life in the real and personal estate (*q*); so where a testator gave his estate to his widow "to be at her disposal in any way she may think best, for the benefit of herself and family," it was held that she took an absolute interest in the gift (*r*). It is the tendency of the modern authorities to restrict rather than to extend the doctrine of precatory trusts (*s*).

(*m*) *Carr* v. *Living* (*ubi sup.*); and see *Wetherell* v. *Wilson* (*ubi sup.*); *Re Booth*, *Booth* v. *Booth*, [1894] 2 Ch. 282; 63 L. J. Ch. 560.

(*n*) See *Re Yates*, *Yates* v. *Wyatt*, [1901] 2 Ch. 438; 70 L. J. Ch. 725.

(*o*) *Thorp* v. *Owen* (*ubi sup.*).

(*p*) *Byne* v. *Blackburn*, 26 Beav. 41.

(*q*) *Thorp* v. *Owen* (*ubi sup.*).

(*r*) *Lambe* v. *Eames*, L. R. 6 Ch. App. 597; 40 L. J. Ch. 447.

(*s*) *Re Adams and the Vestry of St. Mary Abbotts, Kensington*, 27 Ch. D. 394; 54 L. J. Ch. 87; *Re Diggles*, *Gregory* v. *Edmondson*, 39 Ch. D. 253; *Re Hamilton*, *Trench* v. *Hamilton*, [1895] 2 Ch. 370; 64 L. J. Ch. 799; *Hill* v. *Hill*, [1897]

Statutory Powers.

(b) Maintenance under Instruments coming into Operation before January 1, 1926.—Trustees or guardians directed to allow maintenance, or to accumulate income, must follow strictly the words of the instruments under which they are to act. But in order to give trustees wider powers as to the application of the income of property held by them on trust for an infant, section 43 of the Conveyancing and Law of Property Act, 1881 (*t*), was passed. This section is repealed by the Law of Property Act, 1925 (*u*), except in so far as it relates to instruments coming into operation before January 1, 1926, in respect of which much wider powers are given, as set out at the end of this chapter. The provisions of section 43 in regard to instruments coming into operation before January 1, 1926, are as follows:—

(1) "Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not."

(2) "The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorised to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise (*x*); but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year."

The word "property" in this sub-section means "the property the income arising from which has been accumulated" (*y*), that is, the income unappropriated for the

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1 Q. B. 483; 66 L. J. Q. B. 329; *Re Williams, Williams* v. *Williams*, [1897] 2 Ch. 12; 66 L. J. Ch. 485. In considering whether a precatory trust or a condition is attached to a devise or legacy, the Court will be guided by the intention of the testator apparent in the will, and not by any particular words in which the wishes of the testator are expressed.

(*t*) 44 & 45 Vict. c. 41.

(*u*) 15 Geo. V. c. 20.

(*x*) See *Re Buckley's Trusts*, 22 Ch. D. 583; 52 L. J. Ch. 439; *Re Judkin's Trusts*, 25 Ch. D. 743; 53 L. J. Ch. 496.

(*y*) See *Re Bowlby, Bowlby* v. *Bowlby*, [1904] 2 Ch. 685.

maintenance of the infant is to be treated as capital and added to the original capital sum. Thus, if a contingent legacy is settled on an infant tenant for life and the contingency happens, the infant is entitled only to the interest during his life of the amount of the surplus income and the accumulations thereof (*z*). The word "property" in this sub-section would cease to mean primarily "capital," and include unexpended income only where the infant legatee takes a vested interest (*a*).

(3) "This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained."

A trust to accumulate income during the respective minorities of the members of a class is not a "contrary intention" within the meaning of this sub-section (*b*), but where a vested life interest is conferred a contrary intention not to convert the income of the life estate into capital sufficiently appears (*c*).

(4) "This section applies whether that instrument comes into operation before or after the commencement of this Act."

This section applies only where the *corpus* of the contingent legacy is directed to be set apart by the testator for the purpose of meeting the legacy, whether the *corpus* is in the nature of residue (*d*), or otherwise (*e*). It does not apply where, in addition to the contingencies mentioned in the statute, a further contingency is provided for, such as that of surviving a particular person (*f*), or where apart from the Act the infant on attaining twenty-one would only be entitled to the legacy without the income (*g*); or where the whole income is subject to an express trust for accumulation (*h*). Where, however, a will contains no maintenance clause but directs trust property to be

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(*z*) See *Re Bowlby*, *Bowlby* v. *Bowlby*, [1904] 2 Ch. 685. In this case the Court of Appeal practically overruled a decision of Buckley, J., in *Re Scott*, *Scott* v. *Scott*, [1902] 1 Ch. 918; 71 L. J. Ch. 475, in which he held that the trustees of an infant tenant for life held the accumulations of income for the benefit of the infant tenant for life, who on reaching majority took them absolutely.

(*a*) *Re Wells*, *Wells* v. *Wells*, 43 Ch. D. 281; 59 L. J. Ch. 113; *Re Humphreys*, *Humphreys* v. *Levett*, [1893] 3 Ch. 1; 62 L. J. Ch. 498.

(*b*) *Re Thatcher's Trusts*, 26 Ch. D. 426; 55 L. J. Ch. 1050.

(*c*) *Re Humphreys*, *Humphreys* v. *Levett* (*ubi sup.*).

(*d*) *Re Smith*, *Henderson-Roe* v. *Hitchins*, 42 Ch. D. 302; 58 L. J. Ch. 860.

(*e*) *Re Medlock*, *Ruffle* v. *Medlock*, 55 L. J. Ch. 738; *Re Judkin's Trusts* (*ubi sup.*); *Re Dickson*, *Hill* v. *Grant*, 29 Ch. D. 331; 54 L. J. Ch. 510; *Re Burton's Will*, *Banks* v. *Heaven*, [1892] 2 Ch. 38; 61 L. J. Ch. 702.

(*f*) *Re Judkin's Trusts* (*ubi sup.*).

(*g*) *Re Dickson*, *Hill* v. *Grant* (*ubi sup.*).

(*h*) *Re Alford*, *Hunt* v. *Parry*, 32 Ch. D. 383; 55 L. J. Ch. 659.

equally divided among the members of a class on attaining twenty-one, the income of the share of each infant member is applicable to his maintenance (*i*), even in a case where the membership of the class is capable of increase (*k*). Up to the time of the interest of any of the infants becoming vested in possession, the income of the fund to which they are contingently entitled may be devoted to their maintenance (*l*). Where there is no express direction to maintain, and the infant is not in all events entitled to the fund, then this section does not apply. The provisions of this section may be treated as incorporated into any will to which they are applicable for the purpose of determining whether a legacy to an infant child carries the income (*m*). The section does not apply to property the vesting of which is postponed beyond the age of twenty-one years (*n*); consequently, where it is so postponed, clauses for maintenance, education, and the like are necessary (*o*).

Benefit of Infant.—The trustees may apply the income of the fund not only for the maintenance of the infant, but also for his "benefit," a much wider term. The trustees under this Act will, it seems, be able to apply the income for the benefit of the infant in cases where the income will go along with the capital if and when the capital vests, but not otherwise (*p*). In cases not strictly within the provisions of these Acts, the trustee or guardian acts on his own responsibility; and it is therefore usual when there is a necessity for an application on behalf of the infant, and no power to authorise an allowance for maintenance, for the Court, upon the application of the infant by his next friend, to make an order for his maintenance (*q*). It is a rule that whatever expenditure the Court would have sanctioned if applied to by the trustees or guardians of the infant, if laid out by them without application to the Court, will be allowed them on taking accounts (*r*).

The section being retrospective as regards wills or other instruments made before it came into operation is not intended to affect their construction (*s*).

(*i*) *Re Holford, Holford* v. *Holford*, [1894] 3 Ch. 30; 63 L. J. Ch. 637.
(*k*) *Re Jeffery, Arnold* v. *Burt* (No. 2), [1895] 2 Ch. 577; 64 L. J. Ch. 830.
(*l*) *Re Adams, Adams* v. *Adams*, [1893] 1 Ch. 329; 62 L. J. Ch. 266.
(*m*) *Re Moody, Woodroffe* v. *Moody*, [1895] 1 Ch. 101; 64 L. J. Ch. 174.
(*n*) *Re Breeds' Will*, 1 Ch. D. 226; 45 L. J. Ch. 191.
(*o*) See *Re Judkin's Trusts* (*ubi sup.*).
(*p*) Wolstenholme's Conveyancing and Settled Land Acts, p. 109.
(*q*) Dan. Ch. Pr. 1122.
(*r*) *Brown* v. *Smith*, 10 Ch. D. 377, reversing 46 L. J. Ch. 866.
(*s*) *Re Humphreys, Humphreys* v. *Levett*, [1893] 3 Ch. 1; 62 L. J. Ch. 498.

Segregation of Legacy from Residue carries Income.—As a guide to trustees and guardians who have the care and maintenance of infants, the following principles are of great importance. The payment of interest on a contingent legacy (in other words, the title to be maintained out of the interest of the legacy) depends in many cases on the severance of the legacy from the residue of the estate; thus, where a legacy is severed from the residue for the benefit of a tenant for life and a remainderman, the legacy will carry the income for the benefit of the remainderman from the date of the death of the tenant for life, though the interest of the remainderman in the legacy is not yet vested (*t*); and where a fund is directed to be invested and held by the trustees on certain trusts, or is otherwise directed to be set apart from the rest of the testator's estate, it will carry the income which would be capable of being devoted to the maintenance of the infant beneficiary (*u*).

Income Bearing Fund to Class.—Where there is a gift of a fund which carries intermediate income to the members of a class who attain twenty-one, though the first member who attains twenty-one is entitled to the income of his share, yet he is not entitled to the income of the shares of the other members who are minors, which income their guardians would be justified under this Act in employing for their maintenance (*x*). But in the case of a devise of real estate by way of contingent remainder to children as tenants in common, as each child satisfies the conditions of the will his or her share becomes vested; and it is immaterial whether the limitations are legal or equitable (*y*).

Control of Court over Maintenance.—Guardians, having an allowance for maintenance, who duly support and maintain their wards, are not accountable for their expenditure (*z*); but the Court takes care that the sums allowed for maintenance shall be properly applied; and if it thinks that trustees are allowing an insufficient sum, it can increase the amount, though the trustees have a discretion in the matter (*a*). Where a fund was given to trustees who were directed to pay the

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(*t*) *Kidman* v. *Kidman*, 40 L. J. Ch. 359.

(*u*) *Re Medlock, Ruffle* v. *Medlock*, 55 L. J. Ch. 738; *Re Clements, Clements* v. *Pearsall*, [1894] 1 Ch. 665; 63 L. J. Ch. 326; *Re Woodin, Woodin* v. *Glass*, [1895] 2 Ch. 309; 64 L. J. Ch. 501; Theo. Wills, 153. In this last case the report of the case of *Furneaux* v. *Rucker* (1889), W. N. 135, was disapproved of.

(*x*) *Rochford* v. *Hackman*, Kay, 308; *Re Holford, Holford* v. *Holford*, [1894] 3 Ch. 30; 63 L. J. Ch. 637.

(*y*) *Re Averill, Salisbury* v. *Buckle*, [1898] 1 Ch. 523; 67 L. J. Ch. 233.

(*z*) *Joddrell* v. *Joddrell*, 14 Beav. 397.

(*a*) *Re Hodges, Davey* v. *Ward*, 7 Ch. D. 754; 47 L. J. Ch. 335.

income to a mother to be applied by her at her discretion for the benefit of her infant children, and the Court thought she had not exercised a sound discretion, it ordered the income to be paid to the father for the maintenance of the infants (*b*).

Trustees are bound to apply the income of a life interest over which their discretion extends in exoneration of property to which the infant is absolutely entitled (*c*); and where under the order of the Court they have accumulated the income their discretion as to the application of such accumulations towards the maintenance of their infant ward remains unaffected and absolute (*d*).

Difference between a Trust and a Power.—Different considerations arise where trustees have a trust for maintenance and where they have a power. Where they have a trust, they have no discretion, but must carry out the terms of the instrument under which they are to act. Where they have a power, then they have a discretion as to the amount and method of application of the sum to be allowed for maintenance. Under the foregoing Act trustees may apply at discretion any income which in their judgment they deem proper, according to the infant's age, for his or her maintenance or benefit, or pay thereout any money to the infant's parent or guardian for the like purposes. Where trustees have a power to apply all or any part of the income of a trust fund for the maintenance and education of an infant, and they exercise their discretion honestly, the Court will not interfere except on very strong grounds (*e*). But, as above pointed out, their discretion must be duly and properly exercised.

Application to Compel Maintenance by Action.—An application entitled in the matter of an infant does not give the Court jurisdiction to compel trustees to make payments for maintenance, but an action begun by writ or an originating summons is necessary (*f*).

Maintenance to a Father.—As a general rule, maintenance will not be given to a father for the support of his children. The Court of Chancery recognizes the obligation of a father to support his children; and it is a rule of equity that a power or trust for the maintenance of infants is to be exercised and

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(*b*) *Re Roper's Trusts*, 11 Ch. D. 272.
(*c*) See *Re Weaver*, 21 Ch. D. 615.
(*d*) *Re Wise, Jackson* v. *Parrott*, [1896] 1 Ch. 281; 65 L. J. Ch. 281.
(*e*) See *Re Lofthouse* (*an Infant*), 29 Ch. D. 921; 54 L. J. Ch. 1087.
(*f*) *Ibid.*

used with a view to the benefit of the infants, and not for the benefit of the father; and if the father is able to maintain his children, it is not intended to relieve him from the liability to do so (*g*). Thus, in general, the Court will not take the property of the infants and make an allowance out of it to their father for their maintenance (*h*); or, in other words, where the property of the children is derived from the bounty of a stranger, the father, if of ability to maintain his children, is not entitled to any allowance out of the income for that purpose (*i*). But under certain circumstances, notwithstanding an antecedent trust for accumulation, exceptions are allowed to this rule.

Where Father unable to Support his Children.—If the father is not of ability, maintenance will be allowed, though there be no express provision in the gift for that purpose (*k*). Where he is in very poor circumstances, or insolvent, no reference as to his ability will be made (*l*), and where he is poor, and the fund is small, the whole of the dividends will be paid him (*m*); and where he is in distressed circumstances a liberal allowance will be made him (*n*). The terms "ability" and "want of ability" are relative. "Where the question turns upon the ability of the father to maintain the child, the rule is not laid down upon the father's absolute insolvency only, but maintenance is given when the father is not in such circumstances as to be able to give the child such an education as is suitable to the fortune which he expects" (*o*). Thus, in *Jervoise* v. *Silk* (*p*), the father had an income of £6,000 a year, but was allowed £1,200 for the maintenance of his children; so, too, in *Havelock* v. *Havelock, Re Allan* (*q*), General Havelock was possessed of what was styled a "moderate income"; his children were devisees and legatees of a large fortune, the rents and income of which were to be accumulated for twenty-one years; he was allowed £2,700 a year for their maintenance. Under these circumstances maintenance will be allowed, notwithstanding a

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(*g*) See *Wilson* v. *Turner*, 22 Ch. D. 521; 52 L. J. Ch. 70, in which case *Ransome* v. *Burgess* (L. R. 3 Eq. 773; 36 L. J. Ch. 84) was overruled on this point. See *Re Bryant, Bryant* v. *Hickley*, [1894] 1 Ch. 324; 63 L. J. Ch. 197.
(*h*) *Fawkner* v. *Watts*, 1 Atk. 406.
(*i*) *Thompson* v. *Griffin*, 1 Cr. & Ph. 317.
(*k*) *Errat* v. *Barlow*, 14 Ves. 202.
(*l*) *Ex parte Mountfort*, 15 Ves. 445.
(*m*) *Payne* v. *Low*, 1 R. & M. 223.
(*n*) *Roach* v. *Garvan*, 1 Ves. Sen. 160.
(*o*) Per Thurlow, L.C., in *Buckworth* v. *Buckworth*, 1 Cox, Eq. Cas. 80.
(*p*) 1 G. Coop. 52.
(*q*) 17 Ch. D. 807; 50 L. J. Ch. 778.

direction for accumulation (*r*); and not only maintenance for the future will be allowed, but a sum for past maintenance will be allowed to the parent (*s*). But there is no general jurisdiction in the Court to disregard the trust for accumulation even though there is no other way in which provision can be made for the maintenance and education of the person who if living at the end of the period of accumulation will be the tenant for life (*t*).

Fund Given by Way of Bounty.—Where a fund is expressly given to a parent by way of bounty for the maintenance of children, the parent will be entitled to have them maintained out of it, though of ability to support them (*u*); thus, where a wife gave property to her husband in trust to apply as much of it as he thought proper in maintaining and educating their son, which the husband did in a proper manner and died, his estate was allowed so much of the income as he had applied, though he was of ability to maintain him (*x*).

Where Trustees of Settlement Bound to Allow Maintenance for Children.—This exception seems formerly to have been based upon a theory of contract: that the father had by forgoing certain marital rights, and by being party to the instrument which enabled the trustees to exercise their discretion of allowing maintenance for the support of his children, contracted to have his children maintained out of the fund set apart for that purpose, irrespectively of his being able or unable to maintain them himself; and no reference as to his ability to maintain them was required (*y*). A distinction was thus drawn between an ante-nuptial settlement and a post-nuptial or voluntary settlement, on the ground that the contract was purely voluntary (*z*). The effect of this doctrine was limited by holding that where the trustees of the settlement had a mere power, the father was not entitled (*a*).

But there is a case in which it was decided that the right of a father, as party to a settlement, to have maintenance allowed him depends, as in the case of a gift by a stranger, upon whether

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(*r*) *Havelock* v. *Havelock*, *Re Allan* (*ubi sup.*).

(*s*) *Bennett* v. *Wyndham*, 29 L. T. (o.s.) 138.

(*t*) *Re Alford*, *Hunt* v. *Parry*, 32 Ch. D. 383; 55 L. J. Ch. 659. See *Re Smeed*, *Archer* v. *Prall*, 54 L. T. 929; *Kemmis* v. *Kemmis*, 13 L. R. Ir. 372.

(*u*) *Leach* v. *Leach*, 13 Sim. 304.

(*x*) *Malcolmson* v. *Malcolmson*, 17 L. R. Ir. 69.

(*y*) *Mundy* v. *Earl Howe*, 4 Bro. C. C. 223; *Stocken* v. *Stocken*, 4 Myl. & Cr. 95; *Meacher* v. *Young*, 2 Myl. & K. 490; *Ransome* v. *Burgess*, L. R. 3 Eq. 773; 36 L. J. Ch. 84. See *Newton* v. *Curzon*, 16 L. T. 696.

(*z*) *Re Kerrison's Trusts*, L. R. 12 Eq. 422; 40 L. J. Ch. 637.

(*a*) *Thompson* v. *Griffin*, 1 Cr. & Ph. 317.

the trustees have an absolute and obligatory *trust* imposed upon them to allow maintenance, or merely a discretionary *power*, which they cannot be compelled to put in force if their discretion is honestly exercised (*b*). Where it is an obligatory trust, the father can compel the trustees to allow him maintenance, whether he can support his children or not; where they have a discretionary power, the father cannot enforce maintenance (*c*). A mere declaration in a marriage settlement that the trustees should after the death of the wife apply the whole or such part as they should think fit of the annual income of the expectant share of any child for or towards the maintenance of such child, is not an absolute trust to apply the income to the maintenance of the child, but a mere discretionary trust equivalent to a power (*d*). The Court will not ordinarily control the exercise of their discretion by the trustees where it has been honestly exercised (*e*), but where they do not exercise any discretion, but the parent improperly has had the annual income paid to him, the estate of the parent will be held liable to repay the whole of the amount of the income received (*f*).

Maintenance where Children Taken out of Custody of Father.—Where the Court has taken from the father the custody of his children, it will order them to be maintained out of their own means, irrespective of the ability of the father to maintain them (*g*).

Liability of Married Women.—A married woman is not primarily liable for the support of her children, and maintenance was always allowed her, although she was possessed of large separate estate (*h*), and reference as to her ability was dispensed with (*i*). But now, by the Married Women's Property Acts of 1870 (*k*) and 1882 (*l*), where she has separate estate, and her husband is unable to support the children, she becomes liable to that burden; it is therefore submitted that the same principles

(*b*) *Wilson* v. *Turner*, 22 Ch. D. 521; 52 L. J. Ch. 70. In this case, *Ransome* v. *Burgess* (*ubi sup.*) was practically overruled, and the principle in *Mundy* v. *Earl Howe* (4 Bro. C. C. 223) explained.

(*c*) *Wilson* v. *Turner* (*ubi sup.*).

(*d*) *Wilson* v. *Turner* (*ubi sup.*).

(*e*) *Brophy* v. *Bellamy*, L. R. 8 Ch. App. 798; 43 L. J. Ch. 183; *Gisborne* v. *Gisborne*, 23 W. R. 410; *Re Bryant*, *Bryant* v. *Hickley*, [1894] 1 Ch. 324; 63 L. J. Ch. 197.

(*f*) *Wilson* v. *Turner* (*ubi sup.*); and see *Tempest* v. *Lord Camoys*, 21 Ch. D. 571; 51 L. J. Ch. 785.

(*g*) See *Wellesley* v. *Duke of Beaufort*, 2 Russ. 1, 29.

(*h*) *Haley* v. *Bannister*, 4 Madd. 275.

(*i*) *Douglas* v. *Andrews*, 12 Beav. 310; 19 L. J. Ch. 69.

(*k*) 33 & 34 Vict. c. 93, s. 14.

(*l*) 45 & 46 Vict. c. 75, s 21.

which govern the right of the father to claim maintenance, or on which he will be refused it, will be equally applicable to the mother (*m*).

Amount Allowed.—The amount allowed must not, as a general rule, exceed the interest made by the fund (*n*); but where the income is fluctuating, so as to be very large in one year and very small in another, the trustee may expend in one year income derived from another, provided that at the cesser of maintenance he has not spent more than the total income (*o*). It is impossible to lay down any hard-and-fast rule as to the amount that will be allowed by way of maintenance. It is altogether in the discretion of the Court, which will be guided by the rank, fortune, expectations, and the general surroundings of the infant (*p*). Thus, where there are younger children, especially if they are numerous and totally unprovided for, upon an application for maintenance for the eldest son, the Court will make a liberal allowance to him, that he may be the better able to maintain his brothers and sisters, considering him in the light of the head of the family (*q*). This principle has been extended to the case of an illegitimate brother born of the same father and mother, and who had lived with them, but was quite unprovided for (*r*); and an allowance has been made for charitable purposes (*s*). The infant's benefit is the great consideration; if others are at the same time benefited, it is no ground for alleging improper application of the allowance (*t*). Where the fund is small, and the whole of it has been paid to the mother of the infant, who has derived benefit from the expenditure of the amount, even though the trustees ought to have made an application to the Court for permission to make the allowance, the Court will treat it as having been properly applied, and as though sanctioned by itself, and will refuse to make the mother or trustees liable to account for it (*u*). The Court will, at any rate in the event of no opposition by other parties interested, make an order, not only for the personal

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(*m*) See *Bryant, Bryant* v. *Hickley* (*ubi sup.*).
(*n*) *Ex parte Whitfield*, 2 Atk. 315.
(*o*) *Carmichael* v. *Wilson*, 3 Moll. 79.
(*p*) *Re Allan, Havelock* v. *Havelock*, 17 Ch. D. 807; 50 L. J. Ch. 778; *Re Collins, Collins* v. *Collins*, 32 Ch. D. 229; 55 L. J. Ch. 672.
(*q*) See *Pierpoint* v. *Lord Cheney*, 1 P. Wms. 493; *Wellesley* v. *Duke of Beaufort* (*ubi sup.*); and *Tweddell* v. *Tweddell*, T. & R. 13.
(*r*) *Bradshaw* v. *Bradshaw*, 1 J. & W. 647.
(*s*) *Langton* v. *Brackenburgh*, 2 Coll. 446.
(*t*) *Brown* v. *Smith*, 10 Ch. D. 377; reversing 46 L. J. Ch. 866.
(*u*) *Ibid.*

maintenance of the infant, but for the repairing and furnishing a house in which it was intended that he should reside (*x*); thus, in one case where the net income of a property exceeded £14,000 per annum, the mother of an infant tenant in tail was allowed £4,000 a year for the upkeep of the family mansion and suitable maintenance of the infant, though there was a trust for accumulation, and the trustees were to apply only £500 a year for the maintenance and education of the infant (*y*). Where there are more funds than one liable, maintenance will be given from that fund which it is most for the infant's benefit to have recourse to (*z*).

Breaking in upon Principal. Real Estate.—The Court will not break in upon the principal, whether it be in the form of real estate (*a*), or personal (*b*), for the maintenance and benefit of infants, unless in the case of real estate the rents are insufficient to provide maintenance, and the claims of creditors can be protected (*c*), or the contingency of the infant failing to become absolutely entitled can be insured against (*d*). Where the donor is a father, though the rents are insufficient to keep down the interest on incumbrances, a charge on the inheritance for maintenance will be allowed in favour of the infant tenant in fee (*e*). But where there is no income arising out of real estate applicable for the maintenance of an infant remainderman, there is no power to charge the realty for his future maintenance, or for the future maintenance of those who might take in remainder after him (*f*).

Personal Estate.—Where the fund or capital is small the

(*x*) *Griggs* v. *Gibson*, 14 W. R. 538.

(*y*) *Re Walker*, *Walker* v. *Duncombe*, [1901] 1 Ch. 879; 70 L. J. Ch. 417. In the allowance of the £4,000 per annum was included a sum of £100 a year for charities.

(*z*) *Martin* v. *Martin*, L. R. 1 Eq. 369; *Re Wells*, *Wells* v. *Wells*, 43 Ch. D. 281; 59 L. J. Ch. 113.

(*a*) *Butler's Case*, cited 1 Ves. Sen. 95.

(*b*) *Re England*, 1 R. & M. 499; *Davies* v. *Davies*, 2 De G. M. & G. 53.

(*c*) *Butler's Case*, cited 1 Ves. Sen. 95.

(*d*) *De Witte* v. *Palin*, L. R. 14 Eq. 251.

(*e*) *Re Howarth*, L. R. 8 Ch. App. 415; 42 L. J. Ch. 316; but see *Cadman* v. *Cadman*, 33 Ch. D. 397; 55 L. J. Ch. 833. In this case *Re Howarth* was distinguished and doubted. This case was an application on behalf of certain infants entitled to successive estate tail in real estate for whose maintenance there was no income applicable for an order that a sum of money for past maintenance and annual sums for future maintenance should be raised on the security of a charge on the estate. The Court refused to make the order. Lindley, L.J., said, "*In Re Howarth* went to the very verge of the law, and perhaps beyond it." In *Cadman's Case* it will be seen that the estate was in reversion, and the charge sought was for future maintenance.

(*f*) *Re Hamilton* (*Infants*), 31 Ch. D. 291; 55 L. J. Ch. 282; *Cadman* v. *Cadman* (*ubi sup.*).

Court will break into it to allow maintenance, where the infant has no other source from which to look for support; and in the latter case, even where the legacy is large (*g*). Trustees should be more than cautious in breaking into capital without the leave of the Court; for if they have done so improperly they will be rendered personally accountable (*h*). But where they have broken into capital under circumstances which, on an application to the Court for that purpose, would have induced the Court to break into the capital, they will not be called to account merely because they omitted to make the application (*i*).

Past Maintenance.—A father being under natural obligation to support his children will not be allowed for their past maintenance, except under special circumstances (*k*); as where the father became liable to debts he was obliged to contract in supporting the minor, and there was no fund in Court until the time of his application for maintenance (*l*). A mother has been allowed for the past maintenance of her children (*m*); and where trustees allowed her the whole income of a fund for maintenance, without applying to the Court, under circumstances which would have induced the Court to allow it, the income was held properly expended (*n*). But advances to an infant by his mother without any evidence of any intention to claim repayment as for a debt, were held not to constitute a debt due and payable to her out of his estate (*o*); and if advances were made with a view to repayment, they would seem to be limited to necessaries (*p*). Her claim to it in the future, since the passing of the Married Women's Property Act, 1882, will, in all probability, be held to depend upon the like principles which govern the claim of the father.

Maintenance by Stranger.—If a stranger maintains an infant out of charity or affection, he has no claim for the money expended (*q*); but if he maintains it with the intention of being

(*g*) *Harvey* v. *Harvey*, 2 P. Wms. 21.
(*h*) See *Robinson* v. *Killey*, 30 Beav. 520.
(*i*) *Lee* v. *Brown*, 4 Ves. 362; *Prince* v. *Hine*. 26 Beav. 634; *Brown* v. *Smith*, 10 Ch. D. 377.
(*k*) *Ex parte Bond*, 2 Myl. & K. 439. Such as embarrassment of circumstances, *Carmichael* v. *Hughes*, 20 L. J. Ch. 396; debt incurred for maintenance, *Parsons* v. *Peters*, 11 Jur. (N.S.) 150; inability to maintain with regard to other children unprovided for, *Ex parte Penleaze*, 1 Bro. C. C. 387 n; or where he can enforce a trust for that purpose, *Mundy* v. *Earl Howe*, 4 Bro. C. C. 223.
(*l*) *Ex parte Darlington*, 1 Ba. & B. 240.
(*m*) *Bruin* v. *Knott*, 1 Ph. 572.
(*n*) *Brown* v. *Smith*, 10 Ch. D. 377.
(*o*) *Re Cottrell*, *Joyce* v. *Cottrell*, L. R. 12 Eq. 566; 41 L. J. Ch. 70.
(*p*) See *Re Rhodes*, *Rhodes* v. *Rhodes*, 44 Ch. D. 94; 59 L. J. Ch. 298.
(*q*) *Grove* v. *Price*, 26 Beav. 105.

repaid, he may make good his claim (*r*); indeed, "he will have a little more consideration than a trustee, charged with the care of paying an infant when of age a sum of money, would be allowed" (*s*).

A distinction is drawn between past and future maintenance; in the former case, only that which has been properly expended (*t*), whereas in the latter case a proper sum will be allowed, taking into consideration the rank and surrounding circumstances of the infant (*u*). Where the whole of a fund is given to an infant for his maintenance, whether absolutely or contingently, that part of the income which is not applied for his maintenance belongs absolutely to him or his personal representatives (*x*). But where he is not entitled to the whole income but only to be maintained out of it, the surplus follows the destination of the capital (*y*).

Cesser of Maintenance.—Maintenance ceases at the time fixed by the instrument of donation, whether at twenty-one or at an earlier period. But nice questions have arisen as to whether it ceases on marriage or forisfamiliation of the infant (*z*), or where by the instrument it is made to cease at a time earlier than the majority of the infant, though on his attaining twenty-one a legacy is made payable to him. It is now the rule that where a testator, who is a parent, directs that the maintenance of a child shall cease at a date earlier than majority, either on marriage or by attaining a certain age, and a legacy is made payable to him contingently on his attaining twenty-one, the Court may infer that the testator intended that the infant should be maintained as before in the interval between the date fixed for the cesser of maintenance and his majority (*a*).

Advancement.—Advancement may be described as a sum paid out of capital to secure a permanent benefit or advantage in life for the person who is presumably entitled to or has a vested or contingent interest in property before the time fixed for his obtaining the absolute interest in the whole or part of

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(*r*) *Marlow* v. *Pitfeild*, 1 P. Wms. 558.
(*s*) Per Lord Thurlow in *Davies* v. *Austen*, 1 Ves. Sen. 247, 249.
(*t*) See *Bruin* v. *Knott* (*ubi sup.*).
(*u*) See *Jervoise* v. *Silk*, G. Coop. 52. "The general rule of the court is to allow a gross annual sum proportioned to the age and quality of the infant and *quantum* of the estate, not laying down any strict rule." Per Lord Hardwicke in *Moor* v. *Lacy*, Macph. Inf. App. III. p. viii.
(*x*) *Webb* v. *Kelly*, 9 Sim. 469.
(*y*) *Hanson* v. *Graham*, 6 Ves. 239.
(*z*) See *Carr* v. *Living*, 28 Beav. 644.
(*a*) *Chambers* v. *Goldwin*, 11 Ves. 1; *Martin* v. *Martin*, L. R. 1 Eq. 369.

such property (*b*). Advancement is not necessarily restricted to the period of infancy, though it may be so restricted by the terms of the instrument under which it is made (*c*).

Difference between Maintenance and Advancement.—There are certain differences between maintenance and advancement; thus, while the former is generally and nearly always allowed out of income only, the latter is invariably taken out of capital; another is that the former necessitates the payment of various sums from time to time; while the latter is usually the payment of a single lump sum out of the available capital. Again, advancement is a word of larger import than maintenance; and the powers of trustees and guardians under an instrument containing a provision for advancement are considerably increased; thus, the allowance of maintenance stops at majority, unless the instrument of donation otherwise provides; but the advancement or preferment of the person to be benefited can be made after he has attained twenty-one (*d*). But the power to advance the child may be confined to his minority (*e*), though it is not usual to do so. The discretion of trustees who have a discretionary power of advancement will not be controlled merely because an action has been brought for the administration of their testator's estate (*f*). If, however, the trustees refuse to act, or decline to exercise their discretion, then the Court will direct an inquiry whether any and what advancement ought to be made (*g*). The object of maintenance and advancement is the same, viz., the benefit and furthering of the interests of the infant; and, broadly speaking, the same rules apply to the advancement of capital as to the application of interest by way of maintenance. A trustee cannot apply part of the principal towards the advancement of a child where the legacy is subject to a limitation over on the happening of a contingency in favour of a stranger; for the Court itself could not make an order for advancement in such a case (*h*). Unless trustees are expressly authorized they cannot advance part of the *corpus* of an estate to

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(*b*) *Re Aldridge, Abram* v. *Aldridge*, 55 L. T. 554.

(*c*) *Ibid.* The advancement here under consideration is not that made by parents, but by guardians or trustees only. See Part II., Parent and Child, chap. iii. p. 553.

(*d*) *Lowther* v. *Bentinck*, 1 L. R. 19 Eq. 166; 44 L. J. Ch. 197; *Re Breeds' Will*, 1 Ch. D. 226; 45 L. J. Ch. 191.

(*e*) *Clarke* v. *Hogg*, 19 W. R. 617.

(*f*) *Brophy* v. *Bellamy*, L. R. 8 Ch. App. 798; 43 L. J. Ch. 183.

(*g*) *Lewis* v. *Lewis*, 1 Cox, Eq. Cas. 162, cited in *Robinson* v. *Cleator*, 15 Ves. 526.

(*h*) *Lee* v. *Brown*, 4 Ves. 362.

a person who, under the terms of the trust instrument, cannot ever become absolutely entitled to a share of the *corpus*; and the mere fact that the instrument contains a power of advancement *simpliciter* is no such authorization (*i*).

Powers of the Court Larger than those of Trustees.—Advancement, as a rule, cannot be given out of a fund to which an infant is not absolutely entitled, but where the gift of the fund is to a class (of which the infant to be advanced is one) in a certain event, such as attaining twenty-one or marriage, with a limitation over to the survivors or survivor in the case of the death of any under that age or unmarried, then the Court, though not the trustees, can make the advance out of such fund (*k*). A trustee who made such advance, on the contingency not happening which would entitle the infant to the fund, would be liable to make good the amount of the advance to the person entitled over; but as between the infant and himself, he would be allowed it in his account on the coming of age of the former (*l*).

Parents' Claim in Respect of Advancement.—Parents sometimes claim to deduct from legacies and other property belonging to their children the amount of the sums expended for their advancement; but as it is the duty of a father to provide for his child out of his own means, he will not be allowed to recoup himself out of his child's property for any advance made (*m*), unless it is clear that he was unable to afford such advance (*n*). There is now, it is contended, a like liability on the part of the widowed mother, who is clearly bound to support her children. In the old case of *Smee* v. *Martin* (*o*), a mother was not allowed the expense of putting her child out to apprenticeship, on the ground that she was bound to support him, and this must be held to be the law, more especially in view of recent legislation affecting the position and liability of married women.

Advancement under a Power.—Advancement may be made in pursuance of a power contained in the instrument authorizing the trustees to advance either the whole or some portion of the capital to which the donee of the fund is entitled, for the benefit of the donee, whether infant or adult.

(*i*) *Re Aldridge, Abram* v. *Aldridge*, 55 L. T. 554.
(*k*) *Franklin* v. *Green*, 2 Vern. 137. See *Re Breeds' Will*, 1 Ch. D. 226; 45 L. J. Ch. 191.
(*l*) *Worthington* v. *M'Craer*, 23 Beav. 81.
(*m*) *Darley* v. *Darley*, 3 Atk. 399.
(*n*) *Ex parte Hayes*, 3 De G. J. & S. 485.
(*o*) Bunb. 136.

The terms of the power ought to be strictly carried out, and the advancement ought to be made for the *bona fide* benefit of the infant (*p*). Advances for the following purposes have been allowed: Putting an infant to sea (*q*); maintenance (where included in the words of the power) (*r*); a fund settled on the marriage of a daughter (*s*); fund settled by a son in a post-nuptial settlement (*t*); setting up the husband of a daughter in business (*u*) (but not paying the husband's debts (*x*)); setting up a married daughter in a farming business (*y*); the payment of an adult's debts, where the terms of the instrument are wide enough (*z*); and an advance to enable a family to emigrate (*a*). Where the power is discretionary, the Court will not, as a rule, control the discretion of the trustees (*b*), but if they decline to exercise their discretion an inquiry will be directed as to what would be a proper exercise of the power (*c*). It is not a proper exercise of a trustee's discretion to advance to a married woman, after her presumptive share has become vested, a portion of that share to enable her husband to pay off a debt to a co-trustee; and such advancement amounts to a breach of trust (*d*). If a discretionary power is given to trustees for a particular purpose which fails, they cannot exercise it in any other way, though for the benefit of the *cestui que trust* (*e*), but where the gift to the donee is absolute in its nature, and a particular mode is pointed out in which it is to be laid out, the gift will be good, though the money cannot be laid out in that particular mode (*f*), and if in such a case the whole of the amount of the gift be unapplied, the residue will belong to the donee (*g*). A discretionary power of advancement is at an end if the trustees pay the fund into Court under the Trustee

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(*p*) *Simpson* v. *Brown*, 13 W. R. 312.
(*q*) *Warr* v. *Warr*, Prec. Ch. 213.
(*r*) *Robinson* v. *Killey*, 30 Beav. 520.
(*s*) *Lloyd* v. *Cocker*, 27 Beav. 645.
(*t*) *Roper-Curzon* v. *Roper-Curzon*, L. R. 11 Eq. 452.
(*u*) *Re Kershaw's Trusts*, L. R. 6 Eq. 322; 37 L. J. Ch. 751.
(*x*) *Talbot* v. *Marsfield*, L. R. 3 Ch. App. 622.
(*y*) *Ibid.*
(*z*) *Lowther* v. *Bentinck*, L. R. 19 Eq. 166; 44 L. J. Ch. 197.
(*a*) *Re Long*, 38 L. J. Ch. 125.
(*b*) *French* v. *Davidson*, 3 Madd. 396.
(*c*) *Kilvington* v. *Gray*. 10 Sim. 293.
(*d*) *Molyneux* v. *Fletcher*, [1898] 1 Q. B. 648; 67 L. J. Q. B. 392. Kennedy, J., in this case thought that the well-recognised meaning of the word "advancement" precluded the propriety of an advance out of a trust after it had become vested.
(*e*) *Re Ward's Trusts*, L. R. 7 Ch. App. 727; 42 L. J. Ch. 4.
(*f*) *Barlow* v. *Grant*, 1 Vern. 255; *Leche* v. *Kilmorey*, T. & R. 207.
(*g*) *Palmer* v. *Flower*, L. R. 13 Eq. 250; 41 L. J. Ch. 193.

Relief Act (*h*), now replaced by the Trustee Act, 1925 (*i*). Where the discretion is a general one, the Court can exercise it (*k*); but not where it is a personal one, as, for instance, in the case of advances to an individual (*l*). Where an advance has been made without fraud, and the donee is able to sell the subject of the advance, such as the goodwill of a business or share in a partnership, the donee will be entitled to retain the produce of the sale (*m*). The Court does not inquire into the application of money advanced under the power, if it is shown that the purpose for which it was raised was known and a proper one; and trustees who so pay over the amount to be advanced are not liable, though it be afterwards misspent (*n*).

Advancement in the Absence of a Power.—Trustees acting under an instrument which does not give them a power of advancement may make an advance to the infant out of the infant's property, such as the Court itself would have authorized, and will not be called upon to account for having done so (*o*). In such cases, as a rule, the trust fund is small, and the application of the capital is clearly for the infant's benefit (*p*). The following have been held proper advances under the circumstances: To pay for being articled to a solicitor (*q*); for an apprentice fee (*r*); to bring an infant home from a distant country (*s*); for an outfit for an infant going to a distant colony (*t*); towards furnishing a house for the residence of the infant and his mother and brothers (*u*); and for payment of arrears of rent to save ejectment (*x*). Purchase of a commission in the army was deemed formerly a good advancement, and though purchase has been abolished, an advancement for the support of a young man at one of the military academies would be deemed good and proper (*y*).

(*h*) *Re Coe's Trusts*, 4 K. & J. 199; *Re Ashburnham's Trusts*, 54 L. T. 84; *Re Nettlefold's Trusts*, 59 L. T. 315.
(*i*) 15 Geo. V. c. 19, s. 63.
(*k*) *Re Ashburnham's Trusts* (*ubi sup.*).
(*l*) *Re Nettlefold's Trusts* (*ubi sup.*).
(*m*) See *Andrew* v. *Andrew*, 30 L. T. 457.
(*n*) *Re Brittlebank*, *Coates* v. *Brittlebank*, 30 W. R. 99.
(*o*) *Lee* v. *Brown*, 4 Ves. 362.
(*p*) *Barlow* v. *Grant*, 1 Vern. 255; *Andrews* v. *Partington*, 2 Cox, Eq. Cas. 223.
(*q*) *Re Welch*, 23 L. J. Ch. 344.
(*r*) *Franklin* v. *Green*, 2 Vern. 137.
(*s*) *Stephens* v. *James*, 1 Myl. & K. 627.
(*t*) *Re Salter's Trusts*, 17 Ir. Ch. Rep. 176.
(*u*) *Perry* v. *Perry*, 18 W. R. 482.
(*x*) *Ex parte McKey*, 1 Ba. & B. 405. See also *Walsh* v. *Walsh*, 1 Dr. 64.
(*y*) See *Evans* v. *Massey*, 1 Y. & J. 196, and *Cope* v. *Wilmot*, 1 Coll. 396 n; *De Crespigny* v. *De Crespigny*, W. N. (1886), 24.

Hotchpot.—Under an ordinary power of advancement sums advanced would have to be brought into hotchpot.

Application to the Court.—Application to the Court in the matter of maintenance and advancement should be made at chambers by the guardian (if any) or next friend of the infant; if there is an action or matter pending before the Court it should be made by an ordinary summons; but by an originating summons in other cases (*z*). The order can be made not only where there is a fund in Court or under the control of the Court belonging to the infant, the income of which is applicable to his maintenance, but where the fund is not in Court (*a*). Though the old practice of bringing an action in ordinary cases is no longer necessary (*b*), yet an action should be brought in those cases in which the infant's right to maintenance was doubtful (*c*), or where the Court alone and not the trustees can exercise a power in favour of the infant (*d*), and it has been held that an application for advancement out of moneys exceeding £1,000 in Court, under the Legacy Duty Act, should be by petition (*e*). Where an order for maintenance has been obtained to pay a sum to a widow for the support of her infant children, and she marries again, the order is at an end, and a fresh application to the Court ought to be made. But such order does not determine on the death of one of two trustees, who were parties to it (*f*). If an increase of the allowance is required the application should be made by an ordinary summons, supported by an affidavit showing the necessity for the increase (*g*).

Maintenance.

(c) Maintenance and Advancement under Instruments coming into Operation after December 31, 1925.—The Law of Property Act, 1925, having made the provision referred to previously (*h*), that contingent and future testamentary gifts carry the intermediate income unless such income is

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(*z*) Ord. LV. r. 2 (12); Dan. Ch. Pr. 1126.
(*a*) *Re Colgan (Infants)*, 19 Ch. D. 305; 51 L. J. Ch. 180.
(*b*) *Re Howarth*, L. R. 8 Ch. App. 415; 42 L. J. Ch. 316.
(*c*) *Corbett* v. *Tottenham*, 1 Ba. & B. 59.
(*d*) *Re Breeds' Will*, 1 Ch. D. 226; 45 L. J. Ch. 191.
(*e*) *Re Coore*, W. N. (1883), 169.
(*f*) *Brown* v. *Smith*, 10 Ch. D. 377, reversing 46 L. J. Ch. 866.
(*g*) Dan. Ch. Pr. 1126.
(*h*) P. 668, *ante*.

otherwise expressly disposed of, the Trustee Act, 1925 (*i*), enables trustees to apply the income for the maintenance during infancy of the persons entitled, whether the interest is vested or contingent, subject to any prior interests or charges affecting the property. In the case, however, of a contingent interest the section only applies if the limitation or trust carries the intermediate income of the property, but in the case of a future or contingent interest left by the parent or a person *in loco parentis* to the legatee it applies if and for such period as under the general law the legacy carries interest. Provision is also made for payment of the income to the person entitled after attaining majority until the interest becomes vested, or until death or failure of his interest.

Section 31 provides that where any property is held in trust for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges, the trustees may, at their sole discretion, during the infancy of such person, if his interest so long continues, pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance, education or benefit, the whole or such part as may be reasonable in all the circumstances of such income, whether or not there is any other fund applicable to the same purpose, or any person bound by law to provide for his maintenance or education; and if such person on attaining the age of twenty-one has not a vested interest in such income, the trustees shall thenceforth pay the income of the property and of any accretion thereto to him until he either attains a vested interest or dies, or until failure of his interest. In deciding the amount of the income to be so applied during minority the trustees are to have regard to the age of the infant and his requirements and other income applicable for the same purposes, and where they have notice that other income is applicable a proportionate part only should be applied unless the Court otherwise directs.

During the infancy the trustees are to accumulate the residue of the income and invest the same and hold the accumulations on the following trusts. If the infant attains twenty-one or marries under that age and his interest during infancy or until marriage is a vested interest, or on attaining twenty-one or marrying under that age he becomes entitled to the property, the trustees are to hold the accumulations in trust for such

(*i*) 15 Geo. V. c. 19, s. 31.

person absolutely, but without prejudice to any provision in any settlement made under any statutory powers during infancy, and so that his receipt after marriage though still an infant shall be a good discharge. In any other case the trustees, notwithstanding that such person has a vested interest, shall hold the accumulations as an accretion to the capital, and as one fund with such capital, but they may during the infancy, if the infant's interest so long continues, apply the accumulations or any part thereof as if they were income arising in the then current year.

This section applies in the case of a contingent interest only if the limitation or trust carries the intermediate income, but it applies to a future or contingent legacy by the parent of, or a person *in loco parentis* to, the legatee, if and for such period as, under the general law, the legacy carries interest for the maintenance of the legatee, and the section applies to a vested annuity in like manner as if the annuity were the income of property held by trustees in trust to pay the income thereof to the annuitant for the same period for which the annuity is payable, save that accumulations during the infancy of the annuitant shall be held in trust for the infant or his personal representatives absolutely.

Advancement and Benefit.

The Trustee Act, 1925, also makes provision for the application of capital money the subject of a trust, but the section is only to apply where the trust property consists of money or securities or of property held upon trust for sale, calling in and conversion, and such money or securities or the proceeds of such sale are not by statute or in equity considered as land or applicable as capital money for the purpose of the Settled Land Act, 1925 (*k*), which Act deals in Part III. with the investment or other application of capital money, and in Part IV. with the application of capital money to improvements authorized by the Act.

Section 32 provides that the trustees may at any time apply any capital money subject to a trust for the advancement or benefit, in such manner as in their absolute discretion they think fit, of any person entitled to the capital or any share thereof, whether absolutely or contingently on attaining any specified

(*k*) 15 Geo. V. c. 18.

age or on the occurrence of any other event, or subject to a gift over on death under a specified age or on any other event, and whether in possession, remainder or reversion, and notwithstanding that the interest is liable to be defeated by the exercise of a power of appointment or revocation or to be diminished by the increase of the class to which he belongs, provided that the advancement or benefit shall not exceed one half the presumptive or vested share or interest in the trust property, and if the person becomes absolutely or indefeasibly entitled the money so paid shall be brought into account as part of such share, and no such payment shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, unless such person is in existence and of full age and consents in writing to such payment.

The section only applies where the trust property consists of money or securities or property on trust for sale, calling in and conversion, and such property or proceeds thereof is not by statute or in equity considered as land or applicable as capital money for the purposes of the Settled Land Act, 1925, and to trusts constituted or created after December 31, 1925.

CHAPTER VI.

RIGHTS AND DUTIES OF GUARDIANS IN RESPECT OF THE PROPERTY OF THE WARD.

SECTION 1.

Rights and Duties Generally.

Guardianship a Trust.—Guardianship is a trust, and the Court of Chancery, as exercising supreme control over trusts, watches with vigilance over the management of the property of wards by their guardians. "The relation of guardian and ward is strictly that of trustee and *cestui que trust*. I look on it as a peculiar relation of trusteeship. . . . A guardian is not only the trustee of the property, as in an ordinary case of trustee, but he is also guardian of the person of the infant, with many duties to perform, such as to see to his maintenance and education. I consider that . . . of all the property which he gets into his possession in the character of guardian, he is a trustee for the benefit of the infant ward" (*a*). All guardians of whatsoever description are bound to keep safely the property of their wards; they must account for the personal estate, and for the issues and profits of the real. If they make default in their trust they will be held personally responsible. A guardian is bound not to do anything which can place him in a position inconsistent with the interest of his trust, or which has a tendency to interfere with his duty in discharging it (*b*). In managing the affairs of his ward, the guardian is bound to exercise the same care and prudence as a prudent man of business would exercise in the management of his own affairs, but he is not responsible for more. So if he has a discretion, he must exercise it in a fair and honest manner, and if a loss is the result, he cannot be made to bear it; to render him liable some negligence in the

(*a*) Per Lord Romilly in *Mathew* v. *Brise*, 14 Beav. 345.
(*b*) *Hamilton* v. *Wright*, 9 Cl. & Fin. 111.

transaction must be proved (*c*). Consequently, it has been determined, and is now expressly provided by section 23 of the Trustee Act, 1925, that trustees are not bound personally to transact such business connected with or arising out of the proper duties of their trust as, according to the usual mode of conducting business of a like nature, persons acting with reasonable care and prudence on their own account would ordinarily conduct through mercantile agents; and that when, according to the usual and regular course of such business, moneys receivable or payable ought to pass through the hands of such mercantile agents, that course may properly be followed by trustees, though the moneys are trust moneys; and that if, under such circumstances, and without any other misconduct or default on the part of the trustees, a loss takes place through any fraud or neglect of the agents employed, the trustees are not liable to make good such loss (*cc*). But the guardian or trustee must not delegate the execution of his trust unless there is either some moral necessity or sufficient practical reason for so doing (*d*). And it has been held that where trustees for sale are selling, they must receive in person the purchase-money, and not delegate their solicitor to receive it unless specially authorized to do so (*e*).

No Profit out of Office.—As another consequence of the fiduciary relation of guardian and ward, the guardian can make no profit out of his office (*f*), but must in all things act for the benefit of his ward. Whatever advantage or profit results from his dealings with the ward's property accrues entirely for the ward's benefit. If he buy up encumbrances on the ward's estate he must not charge the ward with more than he paid (*g*); and profits from or accretions to the property attach to the estate (*h*). When the guardian purchases the estate of the ward under suspicious circumstances the Court will not hesitate to set aside the purchase, even though the sale purported to have been made under an order of the Court (*i*). "The guardianship should be managed for the ward's benefit. The guardian cannot

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(*c*) *Ex parte Belchier*, Amb. 218; *Speight* v. *Gaunt*, 9 App. Cas. 1; 53 L. J. Ch. 419.

(*cc*) 15 Geo. V. c. 19, s. 23, sub-s. 3 (C).

(*d*) See *Ex parte Belchier*, *ibid.*; *Speight* v. *Gaunt*, *ibid.*

(*e*) *Re Bellamy and the Metropolitan Board of Works*, 24 Ch. D. 387; 52 L. J. Ch. 870.

(*f*) Per Thesiger, L.J., in *De Bussche* v. *Alt*, 8 Ch. D. 314; 47 L. J. Ch. 381.

(*g*) *Henley* v. ——, 2 Ch. Cas. 245.

(*h*) *Lloyd-Jones* v. *Clark-Lloyd*, [1919] 1 Ch. 424; 88 L. J. Ch. 278.

(*i*) *Cary* v. *Cary*, 2 Sch. & Lef. 173.

reap any benefit from the use of the ward's money. He cannot act for his own benefit in any contract, or purchase, or sale, as to the subject of the trust. If he purchases in his character as guardian, he presumptively uses his ward's funds for that purpose. If he settles a debt upon beneficial terms, or purchases it at a discount, the advantage is to accrue entirely to the ward's estate. He cannot be permitted to place himself in an attitude of hostility to his ward, or derive any benefit from the latter's loss. Wherever he abuses the confidence reposed in him, he will be held to a strict accountability" (*k*). If he does unauthorised acts which redound to the advantage of the ward, they will be sanctioned, and the ward will enjoy the benefits derived from them; if, on the contrary, they result in a loss, they will not be sanctioned, but the ward will not be saddled with the loss; and therefore, where there is any doubt, the guardian should apply to the Court for directions and sanction (*l*). A guardian is personally liable for his breaches of trust, and he cannot make the estate of his ward suffer for them; thus, if he invest trust funds in unauthorised investments, on one of which a profit is made, and on the other of which there is a loss, he cannot set off the profits against the loss, but must let the estate have the benefit of the profits, while he remains personally liable for the loss (*m*). An infant ward, or *cestui que trust*, cannot authorise a breach of trust (*n*), or bind himself by adopting it (*o*).

Purchase of Estate of Ward by Guardian.—So a trustee cannot, as a rule, purchase the estate of his ward, for as the relations of vendor and purchaser are antagonistic, the interests of the ward would be likely to suffer (*p*). Again, the situation of the trustee gives him an opportunity of knowing the value of the property, and as he acquires that knowledge at the expense of the *cestui que trust*, he is bound to apply it for the *cestui que trust's* benefit (*q*). But in cases where it would be for the infant's benefit, and absolutely necessary, that the estate should be sold, and the trustee is willing to give more than anyone else, he may bring a suit, make his proposals, and ask leave of the Court to effect the purchase, in which case the Court will examine into the circumstances, inquire whether the price offered

(*k*) Sch. Dom. Rel. s. 348.
(*l*) See *Milner* v. *Lord Harewood*, 18 Ves. 259.
(*m*) See *Farrer* v. *Farrer*, 76 L. T. Jour. 37.
(*n*) *Wilkinson* v. *Parry*, 4 Russ. 272.
(*o*) *Zambaco* v. *Cassavetti*, L. R. 11 Eq. 439.
(*p*) *Campbell* v. *Walker*, 5 Ves. 678
(*q*) See *Ex parte James*, 8 Ves. 348.

was the best that could have been obtained, and after inquiry, will let another person prepare the particulars of sale, and allow the trustee to bid. In such a case, the ward and guardian are, so far as the property and the sale are concerned, at arm's-length towards one another. If the Court has sanctioned the application, and the guardian has purchased, he will be protected; but if he has purchased without the sanction of the Court, even though he has given an adequate price, the transaction will under the circumstances be set aside at the suit of interested parties, and a re-sale directed (*r*); and if the property does not fetch the price given or agreed to be given by the guardian, the latter will be fixed with the amount agreed to be given (*s*). If as trustee a guardian renews a lease which is beneficial, it will enure for the good of the infant (*t*); though he may have purchased the old lease from the infant and been in occupation several years (*u*); or is jointly interested with the infant (*x*); and even where the landlord may have refused to renew for the infant, but allowed the guardian or trustee to renew for himself (*y*).

Unauthorized Acts of Guardians.—A guardian who does an act in his ward's name or on behalf of his ward, does not necessarily bind him or his estate (*z*), but renders himself personally liable, and "it is a general principle that acts done by a guardian without authority will be protected, and will bind the infant, if they turn out eventually beneficial to the latter; but the guardian does such acts at his own risk" (*a*), and "agreements are sometimes made on behalf of infants, without judicial sanction, yet so beneficial that they would be enforced in equity and the infant would not be allowed to avoid them at full age" (*b*). If, on the contrary, the unauthorized transaction was not advantageous, the ward on arriving at majority might disaffirm it, and require the guardian to place him *in statu quo*.

General Duties of Guardians.—The general duties of guardians are to act for the benefit of the infant wards. They

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(*r*) See *Cary* v. *Cary*, 2 Sch. & Lef. 173.
(*s*) *Campbell* v. *Walker* (*ubi sup.*). See also *Tennant* v. *Trenchard*, L. R. 4 Ch. App. 537; 38 L. J. Ch. 169.
(*t*) *Griffin* v. *Griffin*, 1 Sch. & Lef. 352.
(*u*) *Killick* v. *Flexney*, 4 Bro. C. C. 161.
(*x*) *Ex parte Grace*, 1 B. & P. 376.
(*y*) *Campbell* v. *Walker* (*ubi sup.*)
(*z*) *Hooper* v. *Eyles*, 2 Vern. 480.
(*a*) Macph. Inf. 339. (*b*) *Ibid.*

must account for whatever comes into their possession; and not only must they so account, but they must do their best in the management of the real and personal estate of their wards. They must get in all the outstanding personal estate, whether it consists of legacies, or special or simple contract debts, and for such purposes they can give good quittances or receipts; they must reduce the choses in action into possession. So, if the property produces an income, whatever surplus is left over after providing for the management of the property, and the education and maintenance of the ward, should be properly invested by them so as to make the estate as productive as possible. They may sue in the name of the ward as his next friends (*c*). They must manage the property with a view that the most shall be made of the estate during minority, and not of the immediate income only (*d*); and they must not break in upon capital, for it is their duty to preserve the principal entire (*e*). The guardian must not commit waste of his ward's land; and to turn an ancient pasture into arable is on his part an act of waste (*f*).

Powers of Chancery and other Guardians.—There is a difference to be noticed in the powers of a guardian appointed by the Court of Chancery, and of guardians not so appointed. A person who is appointed by the Court of Chancery guardian to an infant who is possessed of property is, so far as the property is concerned, in somewhat the position of a receiver (an officer who used to be more frequently appointed to manage an infant's estate than at present), but has more independent control over the ward's property than a mere servant of the Court. It has been held that he had no control over the ward's property (such as to enable him to give a receipt to a tenant) (*g*) unless he was empowered by an order of the Court to use the whole of the infant's fortune in maintaining him; but as he is compelled to give security to account on taking up the management of the estate, it would seem that he must be entitled to some control over the property (*h*).

Testamentary Guardians. The powers of testamentary

(*c*) 1 Dan. Ch. Pr. 106; Rules of the Supreme Court, 1883, Ord. XVI. r. 16. Where infants defend, guardians *ad litem* are specially appointed. *Ibid.*

(*d*) *Sutton* v. *Jones*, 15 Ves. 588.

(*e*) *Davies* v. *Austen*, 1 Ves. 247; *Walker* v. *Wetherall*, 6 Ves. 473.

(*f*) *Clark* v. *Thorp*, 2 Ves. Sen. 232.

(*g*) *Ex parte Starkie*, 3 Sim. 339; but see Dan. Ch. Pr. 1129.

(*h*) 2 Dan. Ch. Pr. 1120, 1128.

guardians over the person and property of their ward are independent of the authority of the Court of Chancery, and are based upon those of the guardian in socage. The statute which creates their office defines their powers; but these powers over the real property of the ward are not precisely defined, and they have no estate in it (*i*). They may bring actions and avow in their own name, and make leases to take effect during the minority of their ward, but no longer (*k*); and do other acts as *domini pro tempore* (*l*). But they are amenable to the Court of Chancery, and are bound to render an account of the property received and managed by them.

Management of Property.—If the infant is not a ward of Court, the guardian or other person intrusted with his property must act, as to the real estate, according to his own powers as guardian or trustee; he must also follow any special directions, and he may exercise any powers contained in the instrument under which the infant is entitled; and he must, in the absence of such directions or powers, call in the money due to the infant, and invest it in trustee investments (*m*), or in the purchase of any existing charge on the infant's real estate; or he may leave it out, if he finds it on good mortgage security; but if he lays it out on mortgage of any other real estate than the infant's, or if he leaves it out, or having got it in, invests it upon personal security, he does so at his own risk, even though he has express authority to lay out the money in such manner as he shall think most for the infant's advantage, and though the borrower is unquestionably solvent at the time. It is scarcely necessary to add that the infant's money must not be allowed to remain in trade. The investment of an infant's money on mortgage may, if beneficial to him, receive the retrospective sanction of the Court (*n*).

Receipt of Moneys by Co-Trustees.—Where co-trustees have to receive money, they must all give a receipt for it, and it may be paid to *one*, who may hold it for a short time without any responsibility on the part of the others, but he ought not to retain the money longer than is absolutely necessary. The money ought to be deposited to their joint account in some bank of credit, if practicable (*o*).

(*i*) *Gardner* v. *Blane*, 1 Ha. 381.
(*k*) *Roe* dem., *Parry* v. *Hodgson*, 2 Wils. 129.
(*l*) Simp. Inf. 223.
(*m*) See 52 & 53 Vict. c 32.
(*n*) Macph. Inf. 270, and the cases there cited.
(*o*) See *Walker* v. *Symonds*, 3 Swanst. 1.

SECTION 2.

Rights and Duties in Respect of Real Estate.

Conversion.—A guardian must not convert the property of the ward, unless specifically authorized to do so. It has been laid down as a general rule that the nature of an infant's property must not be changed either by a guardian or a trustee out of Court, or by the Court itself, so as to convert personal into real, or real into personal estate (*p*). The reason for this rule is that the guardian has not the power, nor the Court of Chancery jurisdiction, to convert the ward's realty into personalty, merely because it would be beneficial (*q*). To enable the guardian or trustee to sell or purchase property, a special power must be given him in the instrument under which he is to act; and to enable the Court so to act legislative action is necessary (*r*).

The Court will, however, allow personalty to be converted into realty if clearly for the benefit of the infant; and what the Court will allow to be done by its own order, trustees or guardians will be allowed to do (*s*). But the conversion will be one *sub modo*, and not to all intents and purposes; and if the infant owner died under twenty-one, the land purchased with his personalty would go to his legal personal representative, and not to his heir (*t*).

A guardian cannot elect for his infant ward to change the nature of his property; thus, where money is directed to be laid out in land, and the person entitled to it is an infant, the guardian cannot elect to take it as money any more than the infant himself (*u*).

Powers of Sale.—Where trustees or guardians have conferred upon them by the instrument under which they act a power of sale of realty, then they can exercise it; and if a particular time for the sale is appointed, they in their discretion can postpone the sale if for the infant's benefit (*x*); but even for his benefit they cannot anticipate it (*y*); and if

(*p*) Macph. Inf. 278.
(*q*) *Field* v. *Moore*, 25 L. J. Ch. 66; *Calvert* v. *Godfrey*, 6 Beav. 97.
(*r*) *Darley* v. *Darley*, 2 Jo. & Lat. 752, 758. See 44 & 45 Vict. c. 41, s. 5.
(*s*) *Inwood* v. *Twyne*, Amb. 417.
(*t*) *Ashburton* v. *Ashburton*, 6 Ves. 6.
(*u*) See *Seeley* v. *Jago*, 1 P. Wms. 389.
(*x*) *Morris* v. *Morris*, 6 W. R. 493.
(*y*) *Johnstone* v. *Baber*, 8 Beav. 233; and see *Want* v. *Stallibrass*, L. R. 8 Ex. 175; 42 L. J. Ex. 108

they have a discretionary power to postpone a sale, a *bona fide* exercise of their discretion as to the time and mode of sale will not be interfered with (*z*). Where there is a power for sale, the trustees have an implied power to give receipts, otherwise the intention of the donor could not be carried out (*a*). Even when there was no power of sale under which the trustees or guardians could act, the Court of Chancery used to direct sales of infant's realty in suits by mortgagees, or in administration suits; and infants will be bound by the decrees of the Court in such suits just as if they were adults; thus, where the predecessor in title of an infant had mortgaged his lands and died without discharging the incumbrance, and the mortgagee desired to foreclose, the Court could order a sale of the lands when it was to the infant's advantage to sell rather than be foreclosed (*b*); and since realty has been made assets for the payment of all kinds of debts, though the heir or devisee be an infant, the Court can direct the lands of the ancestor or devisor to be sold (*c*). It has now also jurisdiction to raise money by way of mortgage for the payment of debts (*d*). The Court was formerly enabled to decree a conversion by way of sale or mortgage of the estate of an infant where he was absolutely entitled (but not otherwise), by declaring certain costs incidental to the management of his estate to be a charge on the inheritance, and directing them to be raised and discharged (*e*); but this practice was principally followed where the property was small (*f*). It is now provided that "if in any cause or matter relating to real estate, it shall appear necessary or expedient that the real estate or any part thereof should be sold, the Court or a judge may order the same to be sold, and any party bound by the order and in possession of the estate or in the receipt of the rents and profits thereof, shall be compelled to deliver up such possession or receipt to the purchaser, or such persons as may be thereby directed" (*g*).

(*z*) *Re Blake, Jones* v. *Blake*, 29 Ch. D. 913; 54 L. J. Ch. 880.
(*a*) *Breedon* v. *Breedon*, 1 Russ. & Myl. 413.
(*b*) 15 & 16 Vict. c. 86, s. 48. *Siffken* v. *Davis*, Kay, App. 21.
(*c*) 11 Geo. IV. & 1 Wm. IV. c. 47, s. 11; *Brook* v. *Smith*, 2 R. & M. 73.
(*d*) 2 & 3 Vict. c. 60.
(*e*) *Glover* v. *Barlow*, Chamb. Inf. 568; and 21 Ch. D. 788 *n*; and see *In re Jackson. Jackson* v. *Talbot*, 21 Ch. D. 786.
(*f*) *Davis* v. *Turvey*, 8 L. T. 378.
(*g*) Rules of the Supreme Court, 1883, Ord. LI. r. 1. This rule is based upon 15 & 16 Vict. c. 86, s. 55 (Chancery Procedure Act, 1852), but does not confer any new power on the Court to order a sale. *Re Robinson, Pickard* v. *Wheater*, 31 Ch. D. 247; 55 L. J. Ch. 307.

Effect of Sale by Court.—Where an infant's realty has been sold under an order of Court, and he has died under age, questions often arise between his heir-at-law and personal representative as to whom the proceeds belong to. If it has been rightly converted there is no equity on the part of the infant's heir-at-law or remainderman to take the property in any other form than that in which it is found at his death. "Where the Court has power to sell an infant's real estate, and orders it to be sold, the order operates as a conversion, and the estate then becomes personalty" (*h*); and the Court may obtain that power either through an express trust or by the infant himself appearing and consenting to his realty being sold (*i*), or by his guardian *ad litem* (*k*). But the mere fact of an infant being one of several plaintiffs in an action brought under the Partition Act of 1876, in which he is represented by next friend and counsel, in which action a request for sale is made by the parties, does not amount to an election on the part of the infant that his share of the proceeds should be converted into personalty (*l*); but rather, where an infant by a next friend is one of several plaintiffs by counsel requesting a sale, and a sale is ordered upon this request, the proceeds of the infant's share ought to be earmarked as real estate (*m*).

Statutory Powers of Sale.—In order to avoid the difficulties arising concerning the division of property left or settled in undivided shares the Partition Act, 1868 (*n*), and the Partition Amendment Act, 1876 (*o*), enabled the Court, on the request of the guardian of an infant, to authorize a sale of property in a suit for partition if it were deemed to be for the advantage of the infant. These Acts are repealed by the Law of Property Act, 1925 (*p*), without prejudice to proceedings thereunder commenced before January 1, 1926, and under the provisions of the Settled Land Act, 1925 (*q*), undivided shares are to take effect behind a trust for sale. After December 31, 1925, when settled land is held in trust for persons in undivided shares the

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(*h*) Per Jessel, M.R., in *Wallace* v. *Greenwood*, 16 Ch. D. 365; 50 L. J. Ch. 289.
(*i*) *Hyett* v. *Mekin*, 25 Ch. D. 735; 53 L. J. Ch. 241.
(*k*) *Rimington* v. *Hartley*, 14 Ch. D. 630.
(*l*) *Re Norton, Norton* v. *Norton*, [1900] 1 Ch. 101; 69 L. J. Ch. 31.
(*m*) *Howard* v. *Jalland*, W. N. [1891] p. 210; *Re Norton, Norton* v. *Norton* (*ubi sup.*).
(*n*) 31 & 32 Vict. c. 40.
(*o*) 39 & 40 Vict. c. 17.
(*p*) 15 Geo. V. c. 20.
(*q*) 15 Geo. V. c. 18, s. 36.

trustees of the settlement may require the estate owner in whom the estate is vested (subject, in the case of a personal representative, to his rights and powers for the purposes of administration) to convey the land to them or to assent to the land vesting in them as joint tenants. The land is thereupon held on the statutory trusts, which are to sell the land, or to postpone the sale of the whole or any part thereof, and to stand possessed of the net proceeds and of the net rents and profits until sale upon such trusts as may be requisite for giving effect to the rights of the persons interested in the settled land.

The Law of Property Act, 1925, also provides (*r*) that an undivided share in land shall not be capable of being created except as provided by the Settled Land Act, 1925, or as follows, that is to say, that where land is expressed to be conveyed in undivided shares to persons of full age the conveyance operates as if the land had been expressed to be conveyed to the grantees, or the first four grantees named, as joint tenants upon the like statutory trusts for sale as are set out in the Settled Land Act, 1925.

A tenant for life might make a partition of the property under the Settled Land Acts, 1882 (*s*) and 1884 (*t*) (both of which are repealed by the Settled Land Act, 1925 (*u*)), but a sale under these Acts did not effect a conversion of the infant's real estate, the proceeds of a sale of his land under the Act being treated as realty (*x*).

Further powers were given to the Court to authorize sales of settled estates under the provisions of the Settled Estates Act, 1877 (*y*), and to trustees to sell the land of infants by the Settled Land Acts, 1882 (*z*) and 1890 (*a*). The provisions of these Acts are, however, repealed, and the law on the subject consolidated in the Settled Land Act, 1925 (*b*). Where there are no trustees of a settlement, or if the Court thinks that new trustees should be appointed, the Court may, in the case of an infant on the application of his testamentary or other guardian, appoint fit persons to be trustees of the settlement (*c*).

Definition of Settlement.—The Act defines a settlement as:

(*r*) 15 Geo. V. c. 20, s. 34.
(*s*) 45 & 46 Vict. c. 38, ss. 3, 45.
(*t*) 47 & 48 Vict. c. 18, s. 5.
(*u*) 15 Geo. V. c. 18.
(*x*) *Foster* v. *Foster*, 1 Ch. D. 588; 45 L. J. Ch. 301.
(*y*) 40 & 41 Vict. c. 18.
(*z*) 45 & 46 Vict. c. 38.
(*a*) 53 & 54 Vict. c. 69.
(*b*) 15 Geo. V. c. 18.
(*c*) 15 Geo. V. c. 18, s. 34.

Any deed, will, agreement for a settlement or other agreement, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after January 1, 1926, under which any land after that date stands for the time being, (i) limited in trust for any persons by way of succession; or (ii) limited in trust for any person in possession, (α) for an entailed interest whether or not capable of being barred or defeated, (β) for an estate in fee simple or for a term of years absolute subject to an executory limitation, gift, or disposition over, (γ) for a base or determinable fee or any corresponding interest in leasehold land, (δ) being an infant for an estate in fee simple or for a term of years absolute; or (iii) limited in trust for any person for an estate in fee simple or for a term of years absolute contingently on the happening of any event; or (iv) limited to or in trust for a married woman of full age in possession for an estate in fee simple or a term of years absolute or any other interest with a restraint on anticipation; or (v) charged with a rentcharge or any periodical sum for portions, advancement, maintenance, or otherwise (*d*).

Where an infant is beneficially entitled to land, and, by reason of intestacy or otherwise, there is no instrument under which the interest of the infant arises, a settlement shall be deemed to have been made by the intestate or the person whose interest the infant has acquired (*e*). An infant shall be deemed to be entitled in possession notwithstanding any subsisting right of dower (not assigned by metes and bounds) affecting the land, and the right of dower is deemed to be an interest comprised in the subject of the settlement; where dower has been assigned by metes and bounds the letters of administration or probate of the husband's estate shall be deemed to be a settlement made by the husband (*f*). An estate or interest not disposed of by the settlement and remaining in or reverting to the settlor, and the reversion or right of reverter upon the cesser of an interest created by the settlement, are deemed to be comprised in the subject of the settlement (*g*).

Definition of Settled Land. Settled land is defined as land which is or is deemed to be the subject of a settlement.

Transitional Provisions Affecting Settlements Existing before

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(*d*) Sect. 1, sub-s. 1.
(*e*) *Ibid*, sub-s. 2.
(*f*) *Ibid*, sub-s. 3.
(*g*) *Ibid*, sub-s. 4.

January 1, 1926.—Settlements subsisting before this date are trust instruments, and vesting deeds have to be executed vesting legal estate in the tenant for life or statutory owner (*h*), and where the land is vested in personal representatives they are to hold the land on trust to convey to the tenant for life or statutory owner (*i*). Provision is also made as to infants. Where on January 1, 1926, an infant is beneficially entitled to land in possession for an estate in fee simple or for a term of years absolute, or would if of full age be the tenant for life, the land vests in the trustees (if any) of the settlement upon such trusts as may be requisite for giving effect to the rights of the infant (*k*). If there are no trustees then pending their appointment the land shall vest in the Public Trustee, who shall not be entitled to act or charge fees unless requested in writing to act by the parents or parent or testamentary or other guardian (*l*). After the Public Trustee has accepted the trust no other trustees shall be appointed in his place without his consent (*m*). If no person is willing to appoint trustees the parents or testamentary or other guardian may appoint trustees in the place of the Public Trustee, and the provisions of the Trustee Act, 1925, relating to the appointment of new trustees and the vesting of such property shall apply as if the persons nominated had been appointed by the settlement. In default of any such appointment the infant by his next friend may apply to the Court for the appointment of trustees of the settlement (*n*).

This paragraph of the Schedule applies where two or more infants are beneficially entitled, but it does not apply where an infant is entitled jointly with a person of full age, which case is provided for by the Law of Property Act, 1925 (*o*), under which a conveyance of a legal estate in land to an infant jointly with one or more persons of full age operates to vest the legal estate in the other person or persons on the statutory trusts (*p*), and a devise, bequest, or testamentary appointment coming into operation after December 31, 1925, of land to two or more persons in undivided shares, vests the property in the trustees, or, failing trustees, in the personal representatives of the testator upon the statutory trusts (*q*), which are to sell and to stand possessed of the proceeds upon trust to give effect to

(*h*) 15 Geo. V. c. 18, Sched. 2, par. 1.
(*i*) *Ibid*, par. 2.
(*k*) *Ibid*, par. 3, s. 3 (1).
(*l*) *Ibid*, par. 3, s. 3 (1) (ii.).
(*m*) *Ibid* (iii.).
(*n*) *Ibid* (iv.).
(*o*) 15 Geo. V. c. 20.
(*p*) *Ibid*, s. 19 (2).
(*q*) *Ibid*, s. 34.

the rights of the persons interested (*r*). Nor does the paragraph apply where the infant would if of full age have the powers of a tenant for life together with another person of full age (*s*). Where on January 1, 1926, any persons have been appointed under section 60 of the Settled Land Act, 1882 (*t*), with power to act generally or for any specific purpose on behalf of an infant, those persons shall become trustees of the settlement (*u*), who nevertheless have to execute a vesting deed (*x*).

The effect of these provisions is that where there is a beneficiary of full age, entitled together with an infant, the beneficiary of full age has the powers of a tenant for life, but where the beneficiaries are infants or an infant the trustees of the settlement have the powers of a tenant for life in dealing with settled estates in regard to sale and exchange and leasing.

Infants under Settled Land Act, 1925.—Returning to the body of the Settled Land Act, 1925, as opposed to the transitional provisions of the Second Schedule, the interests of infants are dealt with in section 26, which provides that where an infant is beneficially entitled in possession to land for an estate in fee simple or for a term of years absolute, or would if of full age be a tenant for life of or have the powers of a tenant for life over settled land, then during his minority, if the settled land is vested in a personal representative, the personal representative until a vesting instrument is executed, and in any other case the trustees of the settlement, shall have in reference to the settled land and capital money all the powers conferred by the Act and the settlement on a tenant for life and on the trustees of the settlement. Provision is made where the land is vested in a personal representative for an instrument vesting the estate in the trustees at their request, if and when the infant would have been entitled, if of full age, to have the legal estate conveyed to him. The section does not apply where an infant is entitled jointly with a person of full age, but it applies where two or more infants are entitled jointly until one of them attains full age. Nor does the section apply where an infant would, if of full age, constitute the, or have the powers of a, tenant for life together with another person of full age. It applies where there are two or more infants who would, if all of them were of full age, together constitute the tenant for life.

(*r*) 15 Geo. V. c. 20, s. 36.
(*s*) 15 Geo. V. c. 18, 2nd Sched. par. 3, s. 3 (6).
(*t*) 45 & 46 Vict. c. 38
(*u*) 2nd Sched. par. 3, s. 3 (3).
(*x*) *Ibid*, s. 3 (4).

Powers of Tenant for Life.

Who may Exercise Powers.—The tenant for life is defined as the person of full age who is for the time being beneficially entitled under a settlement for his life (*y*). The following persons also, being of full age, shall, when the estate or interest is in possession, have the powers of a tenant for life—(i) a tenant in tail, including a tenant in tail after possibility of issue extinct and including a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail and although the reversion is in the Crown, but not where the land was purchased with money provided by Parliament in consideration of public services; (ii) a person entitled subject to an executory gift over; (iii) a person entitled to a base or determinable fee; (iv) and (v) a tenant for years determinable on life or a tenant for the life of another not merely a lessee at a rent; (vi) a tenant whose estate is liable to cease on the happening of an event or to be defeated by an executory gift over; (vii) a tenant by the curtesy; (viii) a person entitled to the income of land subject to trusts, unless the land is subject to an immediate binding trust for sale; (ix) a person beneficially entitled subject to charges; (x) a married woman entitled to land for an estate in fee simple or for a term of years absolute subject to a restraint on anticipation. In the case of joint tenants they together constitute the tenant for life, and in regard to the persons entitled to exercise the powers of a tenant for life the following provisions should be noted. Where there is no tenant for life the person to exercise the powers is any person of full age on whom such powers are by the settlement expressed to be conferred, and in any other case the trustees of the settlement (*z*). Where a tenant for life has become bankrupt or has parted with his interest and has unreasonably refused to exercise the powers the Court may authorize the trustees of the settlement to exercise them (*a*). A married woman of full age, whether entitled for her separate use or not, and whether restrained from anticipation or not, may without her husband exercise the powers of a tenant for life (*b*).

Sale and Exchange.—The powers of a tenant for life under the Settled Land Act, 1925, which may be exercised on behalf of infants by the trustees of the settlement, or the personal repre-

(*y*) Settled Land Act, 1925, s. 19.
(*a*) *Ibid*, s. 24.
(*z*) *Ibid*, s. 23.
(*b*) *Ibid*, s. 25.

sentatives of the testator if the property is vested in them, or in case of joint ownership of an infant with a person of full age, by that person, are thus set out in section 38 (*c*). A tenant for life

"(i) May sell the settled land, or any part thereof, or any easement, right or privilege of any kind over or in relation to the land, and

"(ii) Where the settlement comprises a manor, may sell the seignory of any freehold land within the manor, with or without any exception or reservation of all or any mines or minerals, or of any rights or powers relative to mining purposes, so as in every such case to effect an extinguishment of the manorial incidents; and

"(iii) May make an exchange of the settled land, or any part thereof, or of any easement, right, or privilege of any kind, whether or not newly created, over or in relation to the settled land, or any part thereof, for other land, or for any easement, right or privilege of any kind, whether or not newly created, over or in relation to other land, including an exchange in consideration of money paid for equality of exchange."

Regulations as to Sales.—With certain savings it is provided by the Settled Land Act, 1925, that every sale must be made for the best consideration in money than can reasonably be obtained, but a sale may be in consideration of a perpetual or terminable rent consisting of principal and interest combined payable yearly or half-yearly to be secured upon the land sold (*d*). The rent to be reserved on any such sale shall be the best rent that can reasonably be obtained, regard being had to any money paid as part of the consideration, or laid out or to be laid out for the benefit of the settled land, but a peppercorn or nominal rent may be made payable for not more than five years from the date of the conveyance (*e*). A condition of re-entry must be included in the conveyance for non-payment of rent within a time to be specified therein not exceeding thirty days (*f*).

A sale may be made in one lot or in several lots, and either by auction or private contract, and may be made subject to any stipulations respecting title, or evidence of title, or other things (*g*). On a sale the tenant for life may fix reserve biddings and may buy in at an auction (*h*).

Regulations as to Exchanges.—The provisions as to exchanges lay down that, save as in this Part of this Act provided (which savings may be taken to be those relating to a rent as consideration), every exchange shall be made for the best consideration in land or in land and money that can reasonably be obtained,

(*c*) 15 Geo. V. c. 18.
(*d*) *Ibid*, s. 39 (1) (2).
(*e*) *Ibid*, s. 39 (3).
(*f*) *Ibid*, s. 39 (4).
(*g*) *Ibid*, s. 39 (6).
(*h*) *Ibid*, s. 39 (7).

and may be made subject to any stipulations respecting title, or evidence of title, or other things, but settled land within shall not be exchanged for land outside England and Wales (*i*).

Sale of Heirlooms.—Before the Settled Land Act, 1882, there was no power in the Court of Chancery to order the sale of heirlooms simply on the ground of benefit of the parties (*k*); but under that Act a tenant for life might sell such heirlooms or any part of them (*l*), where the sanction of the Court was obtained (*m*). Heirlooms that devolve with a dignity as well as with land might be sold (*n*). The tenant for life might bid at the sale (*o*). The Court might refuse to order their sale (*p*). The discretion to be exercised by the tenant for life in the matter of the sale of heirlooms, as in all other matters connected with the Settled Land Act (*q*), should be that of a fair and honest trustee acting for himself and all the other members of the family, whose interests he holds in trust; and the like principles should guide the Court in the exercise of its discretion in granting or withholding its consent to a sale (*r*). Trustees having power to sell settled lands have power to sell heirlooms (*s*). But the Act did not make saleable any property which, vested in a tenant in fee simple, would be unsaleable and inalienable (*t*). Where heirlooms were sold, the money arising from their sale might be applied in discharge of incumbrances on the settled land without keeping such incumbrances on foot for the benefit of the infant remainderman, in whom the heirlooms would vest on attaining majority (*u*). The money arising from the sale of heirlooms was capital money to be invested or applied as other capital money arising under the Act, or in the purchase of other chattels to be settled and held on the same trusts as the original heirlooms (*uu*); and if invested in land, the land so purchased was

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(*i*) 15 Geo. V. c. 18, s. 40.
(*k*) *D'Eyncourt* v. *Gregory*, 3 Ch. D. 635; 45 L. J. Ch. 745.
(*l*) 45 & 46 Vict. c. 38, s. 37 (1).
(*m*) *Ibid*, sub-s. 3. *Re Brown's Will*, 27 Ch. D. 179; 53 L. J. Ch. 920. *Re Houghton Estate*, 30 Ch. D. 102; 55 L. J. Ch. 37. *Re Duke of Marlborough's Settlement, Duke of Marlborough* v. *Majoribanks*, 32 Ch. D. 1; 55 L. J. Ch. 339. *Re Stafford's (Lord) Settlement and Will, Gerard* v. *Stafford*, [1904] 2 Ch. 72; 73 L. J. Ch. 560.
(*n*) *Re Rivett Carnac's Will*, 30 Ch. D. 136; 54 L. J. Ch. 1074.
(*o*) *Re Brown's Will (ubi sup.)*.
(*p*) *Re Beaumont's Settled Estates*, 58 L. T. 916.
(*q*) See sect. 53.
(*r*) *Re Earl of Radnor's Will Trusts*, 45 Ch. D. 402; 59 L. J. Ch. 782.
(*s*) *Constable* v. *Constable*, 32 Ch. D. 233; 55 L. J. Ch. 491.
(*t*) *Re Rivett Carnac's Will (ubi sup.)*.
(*u*) *Re Duke of Marlborough's Settlement, Duke of Marlborough* v. *Marjoribanks (ubi sup.)*.
(*uu*) Sect. 37, sub-s. 2.

not subject to any charges created by the original settlement settling the land in a particular way and providing that the chattels should devolve with the settled land as heirlooms (*v*).

The Settled Land Act, 1882, is replaced by the Settled Land Act, 1925, and its provisions, so far as heirlooms are concerned, apply where personal chattels are settled so as to devolve with settled land, or to devolve therewith as nearly as may be in accordance with the law or practice in force at the date of the settlement, or are settled together with land, or upon trusts declared by reference to the trusts affecting land, and empower a tenant for life of the land to sell the chattels or any of them. The directions as to the application of the proceeds and the sanction of the Court contained in the earlier Act are re-enacted (*w*).

Leasing Powers of Trustees or Guardians.—The powers of guardians, testamentary (*x*), or in socage (*y*), to deal with their wards' real estate (in which they had an interest) by way of granting or taking leases was very limited; and at law they had no power to give a stranger any interest in their wards' land beyond the period at which their own control over it ceased. A guardian appointed by the Court had no power of making a lease valid at law, because he had no estate in the ward's property; and the Court itself had no inherent jurisdiction to grant leases of an infant's property to last beyond his minority (*z*). The first step towards enlarging the powers of trustees and guardians of infants was made in 1830, in which year an Act (*a*) was passed enabling the guardians of infants entitled to leases for a life or lives, or for any term of years, to apply to the Court of Chancery to surrender such leases and renew them (*b*); and where infants held under covenants to renew leases, they and their guardians under the direction of the Court might execute new leases of the same premises (*c*). So, too, where it was for the infant's benefit, the Court might authorize leases of their lands to be made for various purposes (*d*). Under this Act a lease might be granted to extend beyond minority (*e*).

(*v*) *Re Duke of Marlborough and Governors of Queen Anne's Bounty*, [1897] 1 Ch. 712; 66 L. J. Ch. 323.
(*w*) 15 Geo. V. c. 18, s. 67.
(*x*) *Ante*, p. 621.
(*y*) *Ante*, p. 610.
(*z*) Simp. Inf. 367 and the cases there cited.
(*a*) 11 Geo. IV. and 1 Wm. IV. c. 65.
(*b*) Section 12. This applies to leases to which the infants are beneficially entitled. *Re Griffiths (Infants)*, 29 Ch. D. 248; 54 L. J. Ch. 742.
(*c*) Sect. 16.
(*d*) Sect. 17.
(*e*) *Anstey* v. *Hobson*, 2 W. R. 46. See Simp. Inf. 368, 369.

This enactment left the powers of guardians still very much restricted, and the Settled Estates Act, 1856 (*f*), was passed to facilitate the granting of leases of settled estates. This statute and its amending Acts were repealed, and their provisions consolidated, by the Settled Estates Act, 1877 (*g*).

Under the Settled Land Acts, 1882 (*h*) and 1890 (*i*), the powers of trustees and guardians in the matter of leases were still further increased. The Act of 1877 gave power to the Court to authorize leases; under the Act of 1882 power was given to the tenant for life to grant leases for the terms and subject to the conditions set out, with power to the Court to authorize variations of building or mining leases according to the circumstances of each district. The tenant for life was also empowered to grant leases for special objects, and under the Act of 1890 to accept surrenders and grant new leases. These three Acts, with the exception of section 30 of the Act of 1882 (which extends the improvements contained in the Improvement of Land Act, 1864, to include the improvements authorized by the Settled Land Act, 1864), are repealed, and the provisions of the Settled Land Act, 1925, take their place.

Leasing Powers under Settled Land Act, 1925.—The persons entitled to act either as being (i) the tenant for life if of full age; (ii) the trustees of the settlement if the tenant for life is an infant; (iii) and in the case of joint tenants for life where one or more are of full age and one or more are under age, those tenants for life who are of full age, having been fully described, the powers conferred on such persons in regard to leasing will be dealt with. They are as follows (*k*):—

A tenant for life may lease the settled land, or any part thereof, or any easement, right or privilege of any kind over or in relation to the land, for any purpose whatever, whether involving waste or not, for any term not exceeding—

(i) In case of a building lease, 999 years;

(ii) In case of a mining lease, 100 years;

(iii) In case of a forestry lease, 999 years;

(iv) In case of any other lease, 50 years.

Save as hereinafter provided (*l*) every lease—

(i) shall be by deed, and be made to take effect in possession

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(*f*) 19 & 20 Vict. c. 120.
(*g*) 40 & 41 Vict. c. 18.
(*h*) 45 & 46 Vict. c. 38.
(*i*) 53 & 54 Vict. c. 69.
(*k*) 15 Geo. V. c. 18, s. 4.
(*l*) *Ibid*, s. 42 (1).

not later than twelve months after its date, or in reversion after an existing lease having not more than seven years to run at the date of the new lease;

(ii) shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case;

(iii) shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

Provisions follow as to the execution of a counterpart by the lessee, to be delivered to the tenant for life or statutory owner (*m*), that fines received are to be deemed to be capital money (*n*), and that a lease at the best rent that can reasonably be obtained without fine, and whereby the lessee is not dispunishable for waste, may be made for (i) not exceeding twenty-one years without any notice of an intention to make the lease, and though there are no trustees of the settlement; (ii) for not exceeding three years from the date of the writing by any writing under hand only containing an agreement instead of a covenant by the lessee for payment of rent (*o*). A tenant may also (*p*), where a covenant for renewal could be enforced against the owner for the time being, grant a lease by way of renewal, or a lease for confirming a void or voidable lease, but such lease when confirmed must be such as might have been lawfully granted under the Act or otherwise.

Building Leases.—In the case of a building lease the consideration must be the erection of or agreement to erect buildings, the improvement of buildings, or an improvement in connection with building purposes. The rent may be a nominal rent for not more than five years, the land may be apportioned in lots provided no rent may be less than ten shillings, the total rent must not be less than the rent that ought to be reserved for the whole, and no single rent shall exceed one fifth part of the full annual value of the land and buildings (when completed) comprised in that lease (*q*).

Mining Leases.—In the case of a mining lease the rent may be ascertainable by the acreage worked, or the quantities of

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(*m*) Sect. 42 (2). (*n*) Sect. 42 (4). (*o*) Sect. 42 (5).
(*p*) Sect 43. (*q*) Sect. 44.

mineral gotten, or may vary according to the price of the minerals gotten or the market value, or an average of market prices or values; and a fixed or minimum rent may be made payable with power to make up deficiencies in any subsequent specified period free of other rent than the fixed or minimum rent (*r*). Where the tenant for life or statutory owner is impeachable for waste in respect of minerals, three fourth parts of the rent have to be capitalized, otherwise one fourth part, the residue going as rents and profits (*s*).

Variations of Leases.—The Court may authorize variations of building or mining leases where it is shown to be the custom to lease for either purpose for longer terms, or that it is difficult to make leases except for longer terms, and thereupon the tenant for life or statutory owner, and (subject to any direction in the order) each of his successors in title, may grant a lease in conformity with the order (*t*).

The Court exercises the power of extending terms for building and mining leases with circumspection, and where an infant tenant in tail was eighteen years old, and opposed a scheme by which a portion of his estate was to be let for 200 years for building purposes, the Court refused to grant the trustees general authority to make leases for such a term (*u*).

Surrender of Leases. The Settled Land Act, 1925, contains provisions replacing those of the Settled Land Act, 1890, empowering a tenant for life to accept, with or without consideration, a surrender of any lease of settled land, or a regrant of any land granted in fee simple, as to the whole or any part thereof with or without an exception of minerals or easements; and the rent may be apportioned. On the surrender or regrant the tenant for life may make a new lease or grant in fee simple in lots. The new lease or grant in fee simple may comprise additional land or minerals and may reserve any apportioned or other rent or rentcharge, and in determining the amount the value of the lessee's or grantee's interest surrendered or regranted, any fine and the nature of the covenants may be taken into account. All money received other than rent or rentcharge shall, unless the Court otherwise directs on an application made within six months of the receipt, be capital money (*x*).

Acceptance of Leases.—A tenant for life may accept a lease of any land or mines and minerals or easement, right or

(*r*) Sect. 45. (*s*) Sect. 47. (*t*) Sect. 46.
(*u*) *Cecil* v. *Langdon*, 54 L. T. 418. (*x*) 15 Geo. V. c. 18, s. 52.

privilege convenient to be held or worked with the settled land on such terms and conditions as he thinks fit, provided that no fine is to be paid out of capital. The lease shall be deemed to be a subsidiary vesting deed containing the required statements and particulars and may contain an option to purchase (*y*).

Sale of Timber.—Where a tenant for life is impeachable for waste in respect of timber and there is timber ripe and fit for cutting, the tenant for life, with the consent of the trustees or an order of the Court, may cut and sell such timber, three-fourths of the proceeds being capital money and one fourth going as rents and profits (*z*).

Further Powers of Tenant for Life.—Other powers conferred on the tenant for life are to grant water rights to statutory bodies (*a*), to grant land for public and charitable purposes (*b*), to dedicate land for streets, open spaces, etc. (*c*), and to provide land for workmen's dwellings and small holdings (*d*). He is also given power to compromise and release claims and restrictions (*e*), to vary leases and grants (*f*), and to apportion rents (*g*); and all moneys not being rent payable by the tenant for life under these three heads shall be paid out of capital, and all moneys received not being rent shall, unless otherwise directed by the Court, be capital moneys (*h*). Any transaction not otherwise authorized by the Act or by the settlement which, in the opinion of the Court, would be for the benefit of the settled land or the persons interested under the settlement may, under an order of the Court, be effected by a tenant for life if it is one which could have been validly effected by an absolute owner (*i*). Power is given to dispose of the mansion-house, pleasure grounds and park subject to the consent of the trustees of the settlement or an order of the Court, (i) if the settlement is a settlement made or coming into operation before January 1, 1926, and the settlement does not expressly provide to the contrary; or (ii) if made or coming into operation after the commencement of the Act and the settlement expressly provides that these powers or any of them shall not be exercised without such consent or order (*k*). Where the house is usually occupied as a farmhouse and the land usually occupied therewith does not exceed twenty-five acres, it is not to be deemed a

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(*y*) Sect. 53. (*z*) Sect. 66. (*a*) Sect. 54.
(*b*) Sect. 55. (*c*) Sect. 56. (*d*) Sect. 57.
(*e*) Sect. 58. (*f*) Sect. 59. (*g*) Sect. 60.
(*h*) Sect. 61. (*i*) Sect. 64. (*k*) Sect. 65 (1).

mansion-house and may be disposed of in like manner as any other part of the settled land (*l*).

Powers of Management of Infant's Property under Instruments coming into Operation before January 1, 1926.—The trustees or guardians of infants, whether tenants for life or tenants in tail by purchase, were as a rule empowered under the settlement constituting their wards tenants for life to exercise certain powers of management, but they were compelled to exercise those powers strictly within the terms of their authority, on pain of being rendered liable for a breach of trust if any damage was sustained by their wards. The Legislature, to increase these powers, and to supply them where they did not exist, invested the Court of Chancery with power to authorize them (on application to it) to exercise the powers defined by the various Acts passed for that purpose.

Guardians and trustees had wide powers of management of the real estate of their wards conferred upon them by the 42nd section of the Conveyancing and Law of Property Act, 1881 (*m*). There is a series of enactments dealing with this section. By the Settled Land Act, 1925, sub-sections (1), (2), (3) and (7) are repealed; by the Trustee Act, 1925, sub-sections (4) and (5) are repealed. Sub-section (6), which deals with undivided shares, is not specifically referred to, but the sub-section becomes of no effect in view of the practical abolition of undivided shares, which are in future to take effect only behind a trust for sale of the property. By the Law of Property Act, 1925, the whole section is repealed, except so far as relates to instruments coming into operation before the commencement of the Act (*n*). These repealing enactments are contained in successive statutes, chapters numbered 18, 19 and 20, but all the Acts were passed on the same day, April 9, 1925, and come into force on the same day, January 1, 1926. It is presumed that the intention is, notwithstanding the repeals, that the section shall still apply to such instruments, and therefore its terms are set out.

(1) "If and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, and, being a woman, is also unmarried, the trustees appointed for this purpose by the settlement, if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power

(*l*) Sect. 65 (2).
(*m*) 44 & 45 Vict. c. 41.
(*n*) 15 Geo. V. c. 18, s. 36.

of sale of the settled land or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land, and in every such case the subsequent provisions of this section shall apply" (*o*).

Trustees for the purposes of the Settled Land Act are not trustees within this section so as to be entitled to possession of the settled land as against a testamentary guardian (*p*).

(2) "The trustees shall manage or superintend the management of the land, with full power to fell timber or to cut underwood from time to time in the usual course for sale, or for repairs or otherwise, and to erect, pull down, rebuild, and repair houses and other buildings and erections, and to continue the working of mines, minerals, and quarries which have usually been worked, and to drain or otherwise improve the land or any part thereof, and to insure against loss by fire, and to make allowances to and arrangements with tenants and others, and to determine tenancies, and generally to deal with the land in a proper and due course of management, but so that where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only and subject to the same restrictions on and subject to which the infant could, if of full age, cut the same.

(3) "The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.

(4) "The trustees may apply at discretion any income which, in the exercise of such discretion, they deem proper, according to the infant's age, for his or her maintenance, education, or benefit, or pay thereout any money to the infant's parent or guardian, to be applied for the same purposes.

(5) "The trustees shall lay out the residue of the income of the land in investment on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, with power to vary investments; and shall accumulate the income of the investments so made in the way of compound interest, by from time to time similarly investing such income and the resulting income of investments, and shall stand possessed of the accumulated fund arising from income of the land and from investments of income on the trusts following, namely:—

(i) If the infant attains the age of twenty-one years, then in trust for the infant.

(ii) If the infant is a woman and marries while an infant, then in trust for her separate use, independently of her husband, and

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(*o*) This sub-section, dealing with the management of land of an infant during minority, applies where the infant takes by descent. See *Re Cowley*, [1901] 1 Ch. 38; 70 L. J. Ch. 88.

(*p*) *Re Helyar*, *Helyar* v. *Beckett*, [1902] 1 Ch. 391; 71 L. J. Ch. 209.

so that her receipt after she marries, and though still an infant, shall be a good discharge; but

(iii) If the infant dies while an infant, and being a woman without having been married, then, where the infant was under a settlement tenant for life, or by purchase tenant in tail or tail male or tail female, on the trusts, if any, declared of the accumulated fund by that settlement, but where no such trusts are declared or the infant has taken the lands from which the accumulated fund is derived by descent, and not by purchase, or the infant is tenant for an estate in fee simple, absolute or determinable, then in trust for the infant's personal representatives, as part of the infant's personal estate;

but the accumulations, or any part thereof, may at any time be applied as if the same were income arising in the then current year.

(6) "Where the infant's estate or interest is in an undivided share of land, the powers of this section relative to the land may be exercised jointly with persons entitled to possession of, or having power to act in relation to, the other undivided share or shares.

(7) "This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(8) "This section applies only where that instrument comes into operation after the commencement of this Act."

The effect of this section is to supersede the ordinary form of management clauses in settlements of real estate coming into operation before January 1, 1926, and trustees or guardians acting under such settlements can exercise these statutory powers though omitted or only partially inserted in the instrument.

Powers of Management of Infant's Property under Settled Land Act, 1925.—Section 42 of the Conveyancing and Law of Property Act, 1881, is replaced by section 102 of this Act (*q*), which provides that during the infancy of any person who is entitled to a beneficial interest in possession, the trustees appointed for the purpose by the settlement, or if there are none so appointed the trustees of the settlement (unless there is express provision to the contrary in the settlement or order of the Court appointing them or their predecessors), or if none, then any persons appointed as trustees for this purpose by the Court on the application of a guardian or next friend, may enter into and continue in possession of the land on behalf of the infant. The trustees shall manage or superintend the management of the land with full power to fell timber or cut underwood from time to time in the usual course for sale or repairs or otherwise, to erect, pull down, rebuild and repair houses and

(*q*) 15 Geo. V. c. 18.

other buildings and erections, to continue the working of mines, minerals and quarries which have usually been worked; to drain or otherwise improve the land, to insure against loss by fire, to make allowances to and arrangements with tenants and others, to determine tenancies, and to accept surrenders of leases and tenancies, and generally to deal with the land in a proper and due course of management; but so that where the infant is impeachable for waste the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions on and subject to which the infant could if of full age cut the same. The trustees shall out of the income, including the proceeds of sale, pay the expenses incurred in the management, or in the exercise of any power conferred by the section and all outgoings not payable by tenants or others, and keep down any annual sum or interest charged on the land. Where any person becomes contingently entitled to land under any instrument coming into operation after December 31, 1925, this section shall, subject to any prior interests or charges affecting that land, apply until his interest vests, or if his interest vests during his minority, until he attains the age of twenty-one years; but shall only apply so far as a contrary intention is not expressed in the instrument under which the contingent interest arises and subject to the provisions of that instrument.

Trustees' Receipts.—Under the Settled Land Act, 1925 (*r*), provision is made for the giving of receipts by trustees; thus,

"the receipt or direction in writing of or by the trustees of a settlement, or where a sole trustee is a trust corporation, of or by that trustee, or of or by the personal representatives of the last surviving or continuing trustee, for or relating to any money or securities paid or transferred to or by the direction of the trustees, trustee, or representatives, as the case may be, effectually discharges the payer or transferor therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof, and in case of a mortgagee or other person advancing money, from being concerned to see that any money advanced by him is wanted for any purpose of this Act, or that no more than is wanted is raised."

Protection of each Trustee Individually.—Provision is also made for the protection of trustees both individually and generally, and for the reimbursement of the expenses incurred by them in carrying out their trust. Each person who is for the time being trustee of a settlement is answerable for what he

(*r*) Sect. 95.

actually receives only, notwithstanding his signing any receipt for conformity, and in respect of his own acts, receipts, and defaults only, and is not answerable in respect of those of any other trustee, or of any banker, broker, or other person, or for the insufficiency or deficiency of any securities, or for any loss not happening through his own wilful default (*s*).

Protection of Trustees Generally.—The trustees of a settlement, or any of them, are not liable for giving any consent, or for not making, bringing, taking, or doing any such application, action, proceeding, or thing, as they might make, bring, take, or do; and in case of purchase of land with capital money arising under this Act, or of an exchange, partition, or lease, are not liable for adopting any contract made by the tenant for life or statutory owner, or bound to inquire as to the propriety of the purchase, exchange, partition, lease, or other disposition, or answerable as regards any price, consideration, or fine, and are not liable to see to or answerable for the investigation of the title or answerable for a conveyance of land, if the conveyance purports to convey the land in the proper mode, or liable in respect of purchase-money paid by them by direction of the tenant for life or statutory owner to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money, or in any other character, or in respect of any other money paid by them by direction of the tenant for life or statutory owner on the purchase, exchange, lease or other disposition (*t*). The trustees of a settlement may reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them (*u*).

Duty of Trustees to keep down Charges.—As an infant owner in fee is liable to keep down the interest on incumbrances, the guardians may devote the rents and profits of his realty to that purpose (*x*); and in the case of a mortgage, but no other real incumbrance, to reduce the principal (*y*). But he need not pay off a charge on the estate; and it is the practice to make an inquiry whether it would be for the benefit of the infant to pay off the charge (*z*). When the charge is paid off, it will not merge in the inheritance, but remain personalty (*a*), unless the merger

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(*s*) Sect. 96. (*t*) Sect. 97. (*u*) Sect. 100.
(*x*) Settled Land Act, 1925, s. 102 (3).
(*y*) See *Palmes* v. *Danby*, 1 Eq. Cas. Abr. 261; S. C. Prec. Ch. 137.
(*z*) *Norbury* v. *Norbury*, 4 Madd. 191.
(*a*) *Forbes* v. *Moffatt*, 18 Ves. 384; *Dowling* v. *Belton*, 1 Fl. & Kel. 462. In *Seys* v. *Price*, 9 Mod. 217, Lord Hardwicke observed (p. 221): "Where an infant is

can be shown to be beneficial (*b*). The tenant for life may mortgage the settled land, or any part, for the purpose of discharging an incumbrance on it (*c*).

Though an adult tenant in tail is not bound to keep down the interest on charges except as against the remainderman, yet it is the duty of those who receive the rents and profits for the infant to apply them in keeping down the interest during the minority (*d*). This liability of the infant tenant in tail is only as against the remainderman, and his real and personal representatives have no equity against each other to vary the state of things as it existed at his death (*e*).

As the infant tenant for life is bound to keep down the interest on incumbrances, it is the duty of his guardians so to keep them down (*f*).

A trustee or guardian in receipt of rents of an infant's property must pay out of them the succession duty (*g*), but a trustee is not to be liable for any payment of duty in excess of the assets including land vested in him (*h*).

Reimbursement of Expenditure of Trustees.—The powers conferred on trustees include power to execute necessary repairs and improvements. To manage properly, and perform the many duties laid upon owners of property, requires the outlay of money from time to time; and in his account the guardian or trustee will be allowed necessary expenses. Thus, where the infant is bound to renew leases, and the trustee renews them, he will be allowed the cost of renewal, and even has a lien on the estate for the cost (*i*). The amount to be expended is quite a matter of discretion (*k*).

A trustee or guardian need not be specifically authorized to expend sums on repairs or improvements, but if his expenditure is needful and proper, he will be allowed it (*l*); and not only actual guardians and trustees, but also those who have been in

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entitled to a personal estate, and also to a real one which is incumbered with debts and mortgages, the court will direct the personalty to go in discharge of the incumbrances: yet it will not order the mortgages to be assigned to attend the inheritance, but still to be considered distinctly as personal estate for the benefit of the infant."

(*b*) See *Burgess* v. *Mawbey*, T. & R. 167, 175.
(*c*) Settled Land Act, 1925, c. 18, s. 71.
(*d*) *Ibid.*, s. 102 (3).
(*e*) *Bertie* v. *Earl of Abingdon*, 3 Mer. 560.
(*f*) *Revel* v. *Watkinson*, 1 Ves. Sen. 93.
(*g*) See *Brown* v. *Smith*, 46 L. J. Ch. 866.
(*h*) Settled Land Act, 1925, s. 16 (6).
(*i*) *Davies* v. *Home*, 2 Sch. & Lef. 354; Settled Land Act, 1925, s. 100.
(*k*) See *Bennett* v. *Wyndham*, 29 L. T. (o.s.) 138.
(*l*) *Umbleby* v. *Kirk*, 1 C. P. Coop. 254.

possession of the infant's property and made to account as bailiffs will be allowed expenses for proper repairs and improvements (*m*). In order to keep the estate in proper repair the guardian may apply surplus rents and profits, or the accumulations (*n*); and may be authorized to advance part of the personal estate to cultivate the real estate, if for the benefit of the infant's maintenance (*o*). Where the repairs have been necessarily incurred, but the income is insufficient to defray the expenses, the Court will authorize the raising of the amount so expended by a mortgage of the estate (*p*); also by a sale (*q*). Where the infant is absolutely entitled, the Court will direct a mortgage even for prospective repairs, but such repairs must be in the nature of salvage (*r*); but where the remainderman is an infant, the tenant for life must make out a strong case of salvage, if he desires to expend capital money on the settled estate or premises (*s*). Where the settled money is not capital money under the Settled Land Act, the Court would seem to have larger jurisdiction to expend such money on repairs (*t*). But in case of land settled in favour of infants the Court has no jurisdiction to sanction the raising of money by mortgage of the settled land for the purposes of pulling down and rebuilding houses thereon; though the value of the settled property would be greatly increased (*u*). The inherent jurisdiction, however, of the Court of Chancery to sanction the expenditure by trustees of an infant's money on his property (for purposes other than those sanctioned by the Settled Land Act, 1925 (*x*), for the application of capital money) has not been taken away by the Act (*y*). The improvements which may be carried out for the benefit of settled land are set out in the Third Schedule to the Settled Land Act, 1925, and are divided into three classes, the first being those the costs of which are not liable to be replaced by instalments, the second the costs of which the trustees or the

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(*m*) See *Pelley* v. *Bascombe*, 11 W. R. 766.

(*n*) *Cotham* v. *West*, 1 Beav. 381; *Griggs* v. *Gibson*, L. R. 1 Eq. 685; 35 L. J. Ch. 457.

(*o*) *Re Household, Household* v. *Household*, 27 Ch. D. 553; 54 L. J. Ch. 157.

(*p*) *Allan* v. *Backhouse*, 2 V. & B. 65; *Frith* v. *Cameron*, L. R. 12 Eq. 169.

(*q*) *Garmstone* v. *Gaunt*, 1 Coll. 557.

(*r*) *Re Jackson, Jackson* v. *Talbot*, 21 Ch. D. 786; *Glover* v. *Barlow*, cited in *Re Jackson, Jackson* v. *Talbot*.

(*s*) *Re De Teissier's Settled Estates, De Teissier* v. *De Teissier*, [1893] 1 Ch. 153; 62 L. J. Ch. 552.

(*t*) See *Conway* v. *Fenton*, 40 Ch. D. 512; 48 L. J. Ch. 282.

(*u*) *Re Montagu's Settlement, Derbyshire* v. *Montagu*, [1897] 2 Ch. 8; 66 L. J. Ch. 541.

(*x*) 15 Geo. V. c. 18.

(*y*) *Re Hawker's Settled Estates, Duff* v. *Hawker*, 66 L. J. Ch. 341.

Court may, and the third the costs of which must be required to be replaced by instalments (*z*). The procedure to be followed in regard to improvements not authorized by the Act, and the requirements as to replacing by instalments the capital money expended, are set out in the Settled Land Act, 1925 (*a*), and such repayment may be made by the creation of real charges (*b*). The tenant for life and his successors are under obligation to maintain, repair and insure improvements executed under the provisions of the Act (*c*). Mere ornamental improvements will not be allowed for unless they are substantial and beneficial in their nature (*d*).

Insurance Money.—Where the infant is tenant in tail under a settlement, and is under no covenant to insure the settled premises, and his guardian devotes a portion of the rents and profits of the estate to paying on a policy of insurance of the premises against fire, and the premises are destroyed by fire, and it is subsequently found not beneficial for those interested in the settled property that the premises should be rebuilt or restored, the insurance money will belong to the infant tenant in tail as his personal estate, and will not be treated as real estate for the benefit of all persons interested in the settled estate (*e*).

Repairs.—A tenant for life is bound to keep the property in a proper state of repair, and will not be allowed by the Court to be recouped in respect of money spent in repairs (*f*), except in the case of restoration or reconstruction of buildings damaged or destroyed by dry rot (*g*); it will only allow expenditure in the erection of new buildings (*h*).

Cutting of Timber.—Timber forms an important adjunct to real property, and many important questions have arisen as to the right of cutting it, as to the person entitled to the proceeds when felled or blown down, and as to the nature of the proceeds in the eye of the law. The cutting and taking the proceeds of timber has always depended upon the rule against the conversion of real estate into personal, and to cut down and sell trees is

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(*z*) 15 Geo. V. c. 18, 3rd Sched.
(*a*) *Ibid.*, s. 84.
(*b*) *Ibid*, s. 85.
(*c*) *Ibid*, s. 88 (1).
(*d*) See *Bridge* v. *Brown*, 2 Y. & C. C. C. 181.
(*e*) *Seymour* v. *Vernon*, 16 Jur. 189; *Warwicker* v. *Bretnall*, 23 Ch. D. 188.
(*f*) See *Re Leigh's Estate*, L. R. 6 Ch. App. 887.
(*g*) Settled Land Act, 1925, 3rd Sched., Part II.
(*h*) Settled Land Act, 1925, 3rd Sched.

just as much a conversion of one kind of property into another, as to sell the land upon which the trees have grown, and therefore where trustees were unimpeachable for waste and sold timber and afterwards sold land with a reservation of timber the tenant for life was held entitled to the proceeds of sale of the timber cut and the value of the remaining timber sold but not cut (*i*). To cut too much timber, when the cutting is allowed, is as much "waste" as to cut it at all when not allowed.

In cutting timber, the trustee is bound to act for the benefit of the infant; and when once it is cut for the infant's benefit, it becomes and remains as between his heir and personal representative personal estate, even though he die before he attain twenty-one (*k*). Ornamental timber, however, may not be cut in such a case (*l*), nor may any trees planted as an improvement under the Settled Land Act, 1925, be cut down except in proper thinning (*m*).

An infant tenant in tail in possession has the same right to cut down timber as an owner in fee; and it seems that his guardians have a like right to cut it down on their ward's estate (*n*), but they must do it properly, and in due course of management (*o*).

Power to Raise Money.—Where money is required to discharge an incumbrance on the settled land, to pay for an improvement for equality of exchange, for extinguishing or compensating the steward on the extinguishment of manorial incidents or redeeming a compensation rent-charge in respect of such extinguishment, and commuting any additional rents or satisfying any claims in connection with the conversion of perpetually renewable leaseholds into long terms, or any costs in connection with any of these matters, the tenant for life may raise the money on the security of the settled land by a legal mortgage (*p*).

Equitable Waste Restrained.—A tenant for life, unimpeachable for waste, was at law entitled to deal with his property as though he were a tenant in fee or in tail, but was restrained by

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(*i*) *Re Londesborough, Spicer* v. *Londesborough*, [1923] 1 Ch. 500; 92 L. J. Ch. 423.
(*k*) *Dyer* v. *Dyer*, 32 Beav. 504.
(*l*) *Turner* v. *Wright*, 2 De G. F. & J. 234.
(*m*) 15 Geo. V. c. 18, s. 88 (2).
(*n*) *Saville's Case*, Cas. t. Talb. 16.
(*o*) *Hussey* v. *Hussey*, 5 Madd. 44. See *Att.-Gen.* v. *Duke of Marlborough*, 3 Madd. 498; Simp. Inf. 390.
(*p*) Settled Land Act, 1925, s. 71 (1).

the Court of Chancery from committing what was known as "equitable waste," such as cutting ornamental timber, or pulling down the mansion-house, or injuring the inheritance in a capricious or extravagant manner (*q*). By the Judicature Act, 1873, a tenant for life unimpeachable for waste has no longer any legal right to commit "equitable waste," unless an intention to confer such right shall expressly appear by the instrument creating such estate (*r*). This provision is repealed by the Law of Property Act, 1925, which provides that an equitable interest for life without impeachment of waste does not confer upon the tenant for life any right to commit waste of the description known as equitable waste, unless an intention to confer such right expressly appears by the instrument creating such equitable interest (*s*). He must exercise his powers in a husbandlike and proper manner. The trustees of an infant tenant for life unimpeachable for waste have no greater powers than those of an adult tenant for life, and if they exceed them, where they are not authorized by the instrument creating their trust, or do not obtain the sanction of the Court to the exercise of them, they will be liable to account for the proceeds, and be personally and pecuniarily responsible for any damage or loss occasioned by their conduct. A tenant for life, unimpeachable for waste, may cut ornamental timber and take the proceeds of it where the Court itself would have directed the timber so cut to have been cut for the preservation of the remaining ornamental timber. But the Court may, at the instance of the remainderman, grant an injunction restraining the tenant for life from cutting any ornamental timber which ought to be cut, and direct that the cutting shall be done under its supervision (*t*).

When the tenant for life is not impeachable for waste, he may cut timber in the same way as a tenant in tail (*u*); and if he discharge incumbrances on the estate with the proceeds of the timber he is entitled to charge the inheritance with the amount realized by the sale of the timber (*x*); and so trustees who are not impeachable for waste may cut timber, though the Court

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(*q*) See *Garth* v. *Cotton*, 1 Ves. Sen. 524, 546.
(*r*) 36 & 37 Vict. c. 66, s. 25, sub-s. 3.
(*s*) 15 Geo. V. c. 20, s. 135. As to what is sufficient to confer such a right, see *Re Hanbury's Settled Estates*, [1913] 2 Ch. 357; 82 L. J. Ch. 34.
(*t*) *Baker* v. *Sebright*, 13 Ch. D. 179; 49 L. J. Ch. 65.
(*u*) *Bowles' Case*, 11 Rep. 796.
(*x*) *Davies* v. *Westcomb*, 11 Sim. 425.

will take care that they exercise their rights for the benefit of the *cestui que trust* (*y*). Where an infant tenant for life is unimpeachable for waste, and the trustees of the settlement are directed to appropriate the proceeds of the sale in a particular way, the directions of the settlement and not of the Act are to be followed (*z*).

A tenant for life, impeachable for waste, cannot injure the inheritance by cutting timber (*a*), though he may cut "timber-like" trees (that is, trees nearly approaching but not quite reaching the size at which they can be styled "timber"), in a due course of cultivation, for the purpose of improving the growth, or allowing the development of timber trees; but he "can cut all that is not timber with certain exceptions. He cannot cut ornamental trees, and he cannot destroy 'germins,' as the old law calls them, or stools of underwood; and he cannot destroy trees planted for the protection of banks, and various exceptions of that kind; but, with those exceptions which are waste, he may cut all trees which are not timber, with again an exception, that he must not cut those trees which, being under twenty years of age, are not timber, but which would be timber if they were over twenty years of age. If he cuts them down, he commits waste, as he prevents the growth of the timber" (*b*). Where the timber is the crop itself, and felled at usual intervals, the tenant for life will be absolutely entitled to the proceeds, as being of the nature of rents and profits (*c*). An equitable tenant for life is not entitled to windfalls (*d*). But where by custom certain trees (such as beeches) are "timber" and by local usage are "seasonable," that is, can be cut at seasonable times for use in the locality, the tenant for life is entitled to cut at such seasonable times a fair and proper quantity which does not amount to waste (*e*). And where immature trees were cut down

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(*y*) *Marquis of Downshire* v. *Lady Sandys*, 6 Ves. 107.

(*z*) *Re Duke of Newcastle's Settled Estates*, 24 Ch. D. 129; 52 L. J. Ch. 645.

(*a*) But see the Settled Land Act, 1882 (45 & 46 Vict. c. 38, s. 35), which enables a tenant for life impeachable for waste to cut timber ripe and fit for cutting with the consent of the trustees of the settlement, or by order of the Court, and to set apart three-fourths of the proceeds as capital money under the Act. For the limitation of the rights of the tenant for life under this section, see *Re Llewellin, Llewellin* v. *Williams*, 37 Ch. D. 317; 57 L. J. Ch. 316.

(*b*) Per Jessel, M.R., in *Honywood* v. *Honywood*, L. R. 18 Eq. 306, 310; 43 L. J. Ch. 652.

(*c*) *Honywood* v. *Honywood (ubi sup.)*.

(*d*) *Re Harrison's Trusts, Harrison* v. *Harrison*, 28 Ch. D. 220; 54 L. J. Ch. 617.

(*e*) *Dashwood* v. *Magniac*, [1891] 3 Ch. 306; 60 L. J. Ch. 809.

in war time for Government purposes, the proceeds will be apportioned (*f*).

Agricultural Holdings Act, 1883.—Under this Act (*g*), where a landlord or tenant is an infant without a guardian, the County Court judge (who by the Act is the judge seised of such questions) may appoint a guardian of the infant for the purposes of the Act, one of which is the drainage of the lands of the infant owner or tenant.

Inclosure of Commons, &c.—Under the Inclosure Act, 1801 (*h*), guardians may accept allotments made in respect of the inclosure on behalf of their wards, but the latter are not prejudiced by the non-acceptance of the former, provided that they themselves accept their allotments within twelve months of their attaining twenty-one (*i*). The guardians of infants may charge the lands allotted or exchanged to an amount not more than £5 per acre, and if the guardians are in possession of the lands on behalf of their wards, and advance the amount or share with which they are liable to be charged, the commissioners may mortgage the land in question for the reimbursement of their advance (*k*). Under the Inclosure Act, 1845 (*l*), where a person interested in the land to be allotted or exchanged is an infant, the commissioners are empowered to nominate and substitute the guardian for the purposes of the Act in the place of the person so interested (*m*).

Tithe Commutation Act, 1836.—To carry out the purposes of the Tithe Commutation Act, 1836 (*n*), where the patron of any benefice, or owner of lands or tithes, is an infant, his guardian (or, if he has no guardian, a person nominated by the commissioners for the purpose) is substituted in the place of the infant patron or owner (*o*). Under a later Act the guardian of an infant tithe-owner may consent on his behalf to the redemption of the rent-charge in lieu of tithes of any parish which does not exceed £15 in amount, and which has not been apportioned; but the price to be paid must not be less than twenty-four times the amount of such rent-charge (*p*).

Land Tax.—Under 42 Geo. III. c. 116, guardians and all persons having authority to act for infants may contract and

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(*f*) *Re Terry, Terry* v. *Terry*, [1918] W. N. 273; 87 L. J. Ch. 577.
(*g*) 46 & 47 Vict. c. 61, s. 25.
(*h*) 41 Geo. III. c. 109.
(*i*) Sect. 18.
(*k*) Sect. 30.
(*l*) 8 & 9 Vict. c. 118.
(*m*) Sect. 20.
(*n*) 6 & 7 Wm. IV. c. 71.
(*o*) Sect. 15.
(*p*) 9 & 10 Vict. c. 73, s. 1.

agree on their behalf for the redemption of any land-tax made redeemable which such infants could have redeemed if they had not been under an incapacity (*q*). Where guardians of infants are seised or possessed of any manors, messuages, lands, tenements, and hereditaments, in trust, and have authority to act for infants or issue unborn, they may, under the restrictions and regulations contained in the statute, mortgage, convey or grant any rent-charge out of any manors, &c., belonging to or limited or settled to the use or for the benefit of any such infants or issue unborn, which the latter might have sold, mortgaged or charged with any rent-charge for the purpose of redeeming any land-tax in respect of their estate or interest therein, if they had not been under incapacity (*r*). Guardians who have contracted or shall contract on behalf of their infant wards for the redemption of land-tax charged on manors, &c., may transfer to the Commissioners for the Reduction of the National Debt so much of Government stock which shall be standing in the name or names of such infants, &c., as shall be sufficient for the redemption of the land-tax contracted for (*s*). Where any person who has contracted for the redemption or purchase of any land-tax dies without completing his contract, his assets shall be liable to make good the contract; and if the person entitled to his estate is an infant, the executor, guardian, or trustee shall be indemnified against the infant for making good the instalments necessary to make good the contract (*t*).

Lands Clauses Consolidation Act, 1845.—Where land belonging to infants is required for works and undertakings of a public nature (whether to be acquired by the promoters voluntarily or compulsorily), the guardians or trustees of the infants may, under the Lands Clauses Consolidation Act, 1845 (*u*), sell and convey (*x*), or enfranchise copyholds, and release the lands from any rent-charge or incumbrance (*y*). The notice to treat must be given to the guardian of the infant, and not to his next friend, in cases where the promoters of the undertaking desire to take land compulsorily (*z*). If the purchase-money or compensation for lands conveyed by a guardian who could not have conveyed it except for the Act amounts to or exceeds £200, it is to be paid into Court and

(*q*) Sect. 14.
(*r*) Sect. 53.
(*s*) Sect. 128.
(*t*) Sect. 166.
(*u*) 8 & 9 Vict. c. 18.
(*x*) Sect. 7.
(*y*) Sect. 8.
(*z*) *Earl of Harrington* v. *Metropolitan Railway Co.*, 13 L. T. 658.

remain deposited there for the various purposes enumerated in the Act (*a*). If it exceed £20 but does not reach £200, it may be either paid into the Bank of England or paid to two trustees nominated by the guardians of the infant (in case of infancy), if approved of by the promoters of the undertaking (*b*). If the sum is less than £20, then it is to be paid to the guardian or trustees of the infant (*c*).

Power to Grant Land for Public and Charitable Purposes. — Trustees exercising the powers of a tenant for life may sell, give, or convey the settled lands of an infant for the following purposes: For the sites of places of worship, school house, town hall, market house, public library, public baths, museum, hospital, infirmary, literary or scientific institution, drill hall, working men's club, parish room, reading-room or village institute, or for any other public or charitable purpose in connection with the settled land or tending to the benefit of the persons residing, or for whom dwellings may be erected on the settled land, but the site must not exceed one acre in extent (*d*).

Copyhold Act, 1894. — Under the Copyhold Act, 1894 (*e*), the guardians of an infant lord of a manor or copyhold tenant have full power to do what is required by the Act to be done by such infant lord or tenant (*f*).

Presentation to Benefice.—Trustees of a settlement with a right of presentation to a benefice are not thereby constituted patrons of the living (*g*).

Rights and Duties of Guardians in Respect to the Personal Estate.

Fiduciary Position.—Guardians and trustees must use equal care in the management of their ward's and *cestui que trust's* personal estate as in the management of his real estate. Their fiduciary position compels them on the one hand to be most careful of it, and on the other not to make any personal profit out of it. "A trustee who takes another man's money into his hands is bound, whatever other duties he may have to discharge, to take care that the money shall be preserved, and not to deal with it or to do anything with it which a prudent

(*a*) Sect. 69. (*b*) Sect. 71. (*c*) Sect. 72.
(*d*) Settled Land Act, 1925, s. 55.
(*e*) 57 & 58 Vict. c. 46, s. 45.
(*f*) Sect. 39.
(*g*) *Leigh* v. *Leigh*, [1902] 1 Ch. 400; 71 L. J. Ch. 195.

and reasonable man would not do with his own money" (*h*). Thus, they must collect and call in all outstanding debts due to their ward, and generally realize his estate; and, if necessary, bring actions to enforce his claims and rights. If the trust fund be a chose in action, as a debt which may be reduced into possession, it is the trustee's duty to be active in getting it in; and any unnecessary delay in this respect will be at his own personal risk (*i*). The guardian may compound or release a debt, and the infant ward is bound if the act appears to have been for the benefit of the trust estate (*k*). He must not allow the trust funds to remain outstanding upon personal security, even though the borrower may be solvent at the time (*l*). But where the fund is invested on good mortgage security, the trustee or guardian need not call it in (*m*), but he must ascertain that there is no reason to suspect the goodness of the security (*n*).

Rule Against Conversion.—Guardians must not convert the personal estate of their wards into realty (just as they must not convert their realty into personalty), unless there is an express trust for conversion. The Court itself has not this power except through the authority of the person directing the conversion. If the ward's personal property is converted into realty, the latter will be treated as personalty until he attains twenty-one.

Conversion will be allowed under certain circumstances, such as where the property is of a wasting nature, as, for instance, freeholds, or an annuity *pur autre vie* (*o*). In such a case the Court implies the intention that such property should be converted into one of a more permanent character, and so become capable of succession. It will, accordingly, in such an instance, direct a sale and conversion into Government stock. Trustees acting out of Court are bound to observe the same rule in their administration of property out of Court, and if they fail to do so, will be liable as for a breach of trust (*p*). But if in the instrument creating the trust there is

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(*h*) Per Bacon, V.-C., in *Speight* v. *Gaunt*, 22 Ch. D. 727, 736.
(*i*) *Caffrey* v. *Darby*, 6 Ves. 488. See *Cann* v. *Cann*, 51 L. T. 770.
(*k*) *Blue* v. *Marshall*, 3 P. Wms. 381.
(*l*) *Terry* v. *Terry*, Gilb. Eq. 16.
(*m*) *Orr* v. *Newton*, 2 Cox, Eq. Cas. 274.
(*n*) See *Ames* v. *Parkinson*, 7 Beav. 384.
(*o*) *Re Grant, Grant* v. *Grant*, 150 L. T. Jo. 296.
(*p*) Lewin, 330.

an intention that conversion should not take place, in such cases effect will be given to the intention (*q*).

Investment of Property.—Parents, guardians, trustees, executors, receivers, and all persons whatever who hold, with or without authority, any property belonging to infants, though their powers over the estate may be various, are yet equally bound to secure, to manage, and to account for such parts of it as come within their reach; and are subject to all the rules by which trustees are required to be guided, and to other rules having peculiar reference to the infancy of those for whom they act (*r*). It is not only their duty to call in and realize the personal estate of the ward, but to render it productive; they should therefore invest it in those securities which are authorized by the instrument creating their trust, or in default of such authorization in those which are sanctioned by the Trustee Act, 1925 (*s*). If the money be not properly invested and lost, the trustee will be liable (*t*); but he will not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorized by the trust instrument or by the general law (*u*). If he employ the fund for any purposes of his own, any profit made thereby will belong to the *cestui que trust*, while the loss will fall upon himself (*x*). Where the ward's money has been improperly embarked, the ward has an option either to take the profits, or to charge the trustee with five per cent. interest (*y*). Trustees are either authorized to invest their ward's funds in certain specified securities, or not authorized to invest them in any particular security, or they are allowed a wide range of choice. Where their discretion is uncontrolled they will be held harmless, if they have acted *bona fide* (*z*). If they are tied down to certain investments, they must not travel beyond the limit of their authority, or they will be rendered liable for a breach of trust; but if losses are incurred in carrying out their directions, they are not personally responsible for them. If they are not so authorized, then they should invest in those securities which are now

(*q*) Lewin, 330.
(*r*) Macph. Inf. 265.
(*s*) 15 Geo. V. c. 19, ss. 1, 2, 5, 6, 7.
(*t*) *Fletcher* v. *Walker*, 3 Madd. 73.
(*u*) Trustee Act, 1925, s. 4.
(*x*) *Docker* v. *Somes*, 2 Myl. & K. 655.
(*y*) *Westover* v. *Chapman*, 1 Coll. 177.
(*z*) *Re Brown*, *Brown* v. *Brown*, 29 Ch. D. 889; 54 L. J. Ch. 1134.

sanctioned by Parliament, which from their nature are subject to less variation than other stocks, and consequently to less depreciation in value (*a*). Where a trustee lends money on the security of any property on which he can properly lend, he is not to be chargeable with a breach of trust by reason only of the proportion of the loan to the value of the property at the time of the loan, providing he acts on the report of a person whom he reasonably believes to be "an able practical surveyor or valuer" acting independently of the owner of the property, whether in business in the locality or elsewhere, and that the loan does not exceed two thirds of the value as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report. Nor is the trustee chargeable only upon the ground that he dispensed wholly or partly with the production or investigation of the lessor's title, nor on the ground that he accepted a shorter title than a purchaser, in the absence of a special contract, would be entitled to require (*b*). A trustee may contract not to call in money for seven years subject to payment of interest within thirty days of each due date (*c*), and may accept a mortgage in respect of two thirds of the purchase-money on the sale of real estate or a term of at least five hundred years (*d*). He may also apply money in payment of calls on trust shares (*e*).

Where a trustee improperly advances on a mortgage security trust money in excess of what would at the time of investment be a proper amount the security is to be deemed an authorized investment for the smaller sum, and his liability is only for the excess with interest (*f*). Where trustees have a wide range of choice, they must exercise their discretion in a fair and honest manner; and they will be held liable for a reckless investment which a prudent man would have avoided (*g*).

Where Capital Embarked in Trade.—Where a testator dies leaving his capital or part of it embarked in trade, the trustees, unless distinctly authorized to carry on the trade, are bound to call in the money (*h*); at any rate, unless they are expressly so authorized, they should not carry on the trade without the

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(*a*) See Trustee Act, 1925, ss. 1, 2, 5, 6, and 7.
(*b*) Trustee Act, 1925, s. 8.
(*c*) *Ibid.*, s. 10 (1).
(*d*) *Ibid.*, s. 10 (2).
(*e*) *Ibid.*, s. 11 (2).
(*f*) *Ibid.*, s. 9.
(*g*) See *Re Brown*, *Brown* v. *Brown* (*ubi sup.*).
(*h*) *Kirkman* v. *Booth*, 11 Beav. 273.

sanction of the Court (*i*). If the fund so embarked in trade is difficult to call in, the Court will in proper cases allow the business to be carried on, but only on terms beneficial to the infant ward (*k*); but except on a creditor's suit, or where the testator's will sanctions it, the Court has no jurisdiction to authorize the continuance of the business (*l*). If the trustees, however, have acted *bona fide*, they will not be held responsible for not immediately converting the money (*m*); but this onus of justifying the non-conversion is thrown upon them (*n*). A trustee is personally liable for all debts incurred by him in carrying on the business, and he can only recoup himself out of the specific assets directed to be employed in the business (*o*).

Estate must be made Productive.—So far is it the duty of a trustee to make his ward's estate productive, that if it is properly invested, and he improperly withdraw it, he will be charged with interest on the amount (*p*). While the money is awaiting immediate investment, the guardian should deposit it temporarily in a bank (*q*), but in such a manner that the *cestui que trust* may follow the fund into the hands of the bankers (*r*); and it is no objection that the bank allows interest on the deposits (*s*). But if the trustee pay the money to his own credit, and not to the separate account of the trust estate (*t*), or if he allow the drafts of another person to be honoured who draws upon the account and misapplies the money, the trustee will be personally liable for the consequences (*u*); and the trustee must not lodge the money in such a manner as to put it out of his own control, though it be not under the control of another (*x*). But as the obligation of a trustee or personal representative is to conduct the business of the trust in the same way as an ordinary prudent man of business and no further, if he has

(*i*) *Drake* v. *Fortune*, 1 Moll. 201; *Martindale* v. *Martindale*, 1 Jur. (N.S.) 932; *Perry* v. *Perry*, 17 W. R. 815.
(*k*) *Perry* v. *Perry* (*ubi sup.*).
(*l*) *Land* v. *Land*, 43 L. J. Ch. 311.
(*m*) *Garrett* v. *Noble*, 6 Sim. 504.
(*n*) See *Grayburn* v. *Clarkson*, L. R. 3 Ch. 605; 37 L. J. Ch. 550.
(*o*) For the rights and liabilities of trustees and executors carrying on a business, see *Re Johnson, Shearman* v. *Robinson*, 15 Ch. D. 548; 49 L. J. Ch. 745; *Re Evans, Evans* v. *Evans*, 34 Ch. D. 597; and *Re Gorton, Dowse* v. *Gorton*, 40 Ch. D. 536; 58 L. J. Ch. 403.
(*p*) *Mosley* v. *Ward*, 11 Ves. 581.
(*q*) Trustee Act, 1925, s. 11 (1).
(*r*) *Ex parte Kingston, Re Gross*, L. R. 6 Ch. App. 632.
(*s*) *Re Marcon's Estate* (1871), W. N. 148.
(*t*) *Wren* v. *Kirton*, 11 Ves. 377; *Mathew* v. *Brise*, 6 Beav. 239.
(*u*) *Evans* v. *Bear*, L. R. 10 Ch. App. 76.
(*x*) Lewin, 327. *Salway* v. *Salway*, 2 R. & M. 215; S. C. *White* v. *Baugh*, 3 Cl. & Fin. 44.

money of his ward's to invest he may employ solicitors, bankers, stockbrokers, or other persons, to transact business in the execution of the trust, including the receipt and payment of money; he is to be allowed the expenses so incurred, and is not to be responsible for the default of any such agent if employed in good faith. Trustees or personal representatives may appoint any person to act as agent or attorney to sell, convert, collect, manage, cultivate, or administer any property, and shall not by reason only of having made such appointment be responsible for any loss arising thereby. Without prejudice to this general power a trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or property by permitting him to have the custody of a deed containing a receipt signed by the person entitled to give a receipt. So, too, a banker or a solicitor may be appointed an agent to receive policy money under a policy of insurance, and to have the custody of the policy and a receipt for the policy moneys, but the trustee is not protected in case he permits any such money or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary for paying or transferring the same to the trustee (*y*). Under the Trustee Act, 1925 (*z*), a trustee who has become personally liable for a breach of trust, whether before or after the commencement of the Act, may be wholly or partly relieved from such liability, but only where he has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, or for omitting to obtain the directions of the Court in the matter of such breach (*a*). But the onus of proof of honest and reasonable action is on the trustee (*b*); and the mere fact that he acted honestly is not sufficient (*c*). The agent must not be employed out of the ordinary scope of his employment (*d*). To allow a solicitor to hold the securities on which the trust funds are invested may amount to such negligence (*e*).

Infants as well as adults are, it seems, bound by the composition or release of a debt by a personal representative or

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(*y*) Trustee Act, 1925, s. 23.
(*z*) 15 Geo. V. c. 19, s. 61.
(*a*) See *Re Turner, Barker* v. *Ivimey*, [1897] 1 Ch. 536; 66 L. J. Ch. 282.
(*b*) See *Re Kay, Mosley* v. *Kay*, [1897] 2 Ch. 518; 66 L. J. Ch. 759.
Re Stuart, Smith v. *Stuart*, [1897] 2 Ch. 583; 66 L. J. Ch. 780.
(*c*) *Re Barker, Ravenshaw* v. *Barker*, 77 L. T. 712.
(*d*) *Fry* v. *Tapson*, 28 Ch. D. 268; 54 L. J. Ch. 224.
(*e*) *Re Dewar, Dewar* v. *Brooke*, 54 L. J. Ch. 830.

trustee, if the act appears to have been for the benefit of the trust estate (*f*).

Where there are directions to invest, the trustee must strictly conform to them. He must not lend his ward's money on personal security (*g*), unless he is expressly authorized to do so (*h*). He may invest on real securities in the United Kingdom, which is defined as meaning Great Britain and Northern Ireland (*i*), unless expressly forbidden to do so.

When Trustee Charged with Interest.—If the trustee is negligent, and delays investing the trust funds, he will be held responsible, and be made to pay interest on them. The principles upon which those in a fiduciary position are chargeable with interest in respect of their trust funds have been thus laid down (*l*): If an executor has retained balances in his hands which he ought to have invested, the Court will charge him with simple interest at four per cent. on these balances; even if no case of wilful default is made out against him (*m*); if, in addition to such retention, he has committed a direct breach of trust, or if the fund has been taken by him from a proper state of investment in which it was producing five per cent., he will be charged with interest after the rate of five per cent. per annum; if, in addition to this, he has employed the money so obtained by him in trade or speculation for his own benefit and advantage, he will be charged either with the profits actually so obtained by him from the use of the money, or with interest at five per cent. per annum, and also with yearly rests, that is, with compound interest (*n*).

When Trust Fund Ordered to be Paid into Court.—In cases where it is apprehended that the fund is in peril from the misconduct of trustees, or likely to be lost, the fund will be ordered to be paid into Court. Where any person proves his title to or interest in a fund (*o*), the Court may call upon a person who admits directly or indirectly that he holds a fiduciary

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(*f*) Macph. Inf. 272.
(*g*) *Walker* v. *Symonds*, 3 Swanst. 1, 80.
(*h*) See *Paddon* v. *Richardson*, 26 L. T. (o.s.) 33.
(*i*) Trustee Act, 1925, s. 1.
(*l*) Per Sir John Romilly in *Jones* v. *Foxall*, 15 Beav. 388, 392.
(*m*) *Re Barclay, Barclay* v. *Andrew*, [1899] 1 Ch. 674; 68 L. J. Ch. 383.
(*n*) See *Raphael* v. *Boëhm*, 11 Ves. 92; *Knott* v. *Cottee*, 2 Ph. 192; *Re Barclay, Barclay* v. *Andrew* (*ubi sup.*). In this case the negligent trustees were charged compound interest at the rate of three per cent. on the balances. The Court in fixing the rate of interest to be charged against a trustee has regard to what are the current rates of interest.
(*o*) *Hagell* v. *Currie*, L. R. 2 Ch. App. 449; 36 L. J. Ch. 448.

position in regard to the fund, to pay it into Court (*p*); and if the person holding the fund does not dispute the allegation of the *cestui que trust*, even though he does not appear, it is a sufficient admission upon which the Court can act (*q*). Trustees or the majority of them having in their hands or under their control moneys or securities belonging to a trust may pay the same into Court to be dealt with according to the orders of the Court (*r*).

Legacy to Infant.—If a legacy is directed to be paid to the trustee or guardian of an infant ward, the executor may safely pay it to the guardian or trustee, whose receipt will discharge the executor (*s*); and the legacy the guardian should advantageously invest. It is different where the legacy is directed to be paid to the ward himself, or there is no direction to pay it to his trustee or guardian; the infant ward cannot give a valid receipt, therefore the executor cannot safely pay it over to him. Under the provisions of the Administration of Estates Act, 1925 (*t*), where an infant is absolutely entitled under a will or on the intestacy of a person dying before or after the commencement of the Act to a devise or legacy or the residue or a share therein, and the property is not left to trustees by the will (if any), the personal representatives of the deceased may appoint a trust corporation or two or more individuals, not exceeding four (whether or not including one or more of the personal representatives), to be the trustee or trustees for the infant for the purposes of the Settled Land Act, 1925, and of the statutory provisions relating to the management of land during a minority. On such appointment the personal representatives as such shall be discharged from all further liability, and the property may be retained in its existing condition, or may be converted into money and the money invested in any authorized investment.

Where a personal representative before January 1, 1926, retained or sold any such legacy, bequest, or residue and invested the same or the proceeds in any investments in which he was authorized to invest money subject to the trust, then subject to any order of the Court made before that date he shall not be deemed to have incurred any liability on that account, or by

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(*p*) *London Syndicate* v. *Lord*, 8 Ch. D. 84; *Freeman* v. *Cox*, 8 Ch. D. 148; 47 L. J. Ch. 560.
(*q*) *Freeman* v. *Cox* (*ubi sup.*).
(*r*) Trustee Act, 1925, s. 63.
(*s*) 1 Rop. Leg. 771; *Robinson* v. *Tickell*, 8 Ves. 142.
(*t*) 15 Geo. V. c. 23, s. 42 (1).

reason of not having paid the money or transferred the property into Court (*u*).

If the executor or administrator keep the money in his own hands, he will be decreed to make it good, with interest at four per cent. (*x*).

Appropriation by Executor.—Where the executor appropriates a specific fund to answer the legacy, which afterwards turns out insufficient, or is lost, he must make it good (*y*). If he purports to appropriate specifically a sum to meet the legacy, which turns out insufficient or is lost, as between the infant and the residuary legatees, the former will not be made to bear the loss, because it is impossible for him to have assented to the appropriation (*z*).

Legacy Charged on Real Estate.—If a legacy is given to an infant charged on real estate payable at twenty-one, whether the trustee would be safe in accepting payment of the legacy before the infant attains twenty-one, is a question of construction of the instrument of donation; if the apparent intention of the charge is that the estate shall remain a continuing security for it, the trustee cannot safely receive payment of the legacy and invest it in Consols, for they may decline in value (*a*).

Legacy Payable in futuro.—But where a legacy is given to an infant, payable *in futuro*, the Court, or the executor of his own authority, may lay out in the purchase of Government stock a sum equal to the legacy, and this appropriation binds all parties, and the legatee must abide by the rise or fall in the value of the funds (*b*). Where the appropriation is under the direction of the Court, it binds the legatee, who must on the one hand bear all losses that flow from it, and on the other is entitled to all profits derived from it (*c*). But such appropriation must be reasonably sufficient for the purpose at the time it is made. Trustees or executors have the power, *virtute officii*, to appropriate specific assets to answer settled shares of residue, though the interests of infants are concerned (*d*). But it would be advisable, if the circumstances of the case were intricate

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(*u*) 15 Geo. V. c. 23, s. 42 (2).
(*x*) *Rimmell* v. *Simpson*, 18 L. J. Ch. 55.
(*y*) *Byrchell* v. *Bradford*, 6 Madd. 13.
(*z*) *Baker* v. *Farmer*, L. R. 3 Ch. App. 537; 37 L. J. Ch. 820.
(*a*) Simp. Inf. 413, and the cases there cited.
(*b*) Macph. Inf. 275; *Green* v. *Pigot*, 1 Bro. C. C. 103.
(*c*) *Green* v. *Pigot* (*ubi sup.*); *Burgess* v. *Robinson*, 3 Mer. 7; *Rock* v. *Hardman*, 4 Madd. 253.
(*d*) *Re Nickels*, *Nickels* v. *Nickels*, [1898] 1 Ch. 630; 67 L. J. Ch. 406.

and complicated, to obtain the sanction of the Court to the appropriation.

Fund in Court.—Where an infant on attaining majority is entitled absolutely to a fund which is in Court, the Court will order the fund to be paid out to him (*e*). If the payment out has been obtained by other persons by fraud or negligence, the guilty or negligent party will be held liable to replace the fund, and make good all loss (*f*).

SECTION 3.

Receivers.

A receiver is appointed by the Court for the purpose of protecting the property of those whose interests in it are the subject-matter of a suit, and his possession is that of the Court itself (*g*), or of the persons found entitled in the suit (*h*). A receiver is an indifferent person between the parties appointed by the Court to receive the rents and profits of real estate, or to get in and collect personal estate, or other things in question pending the suit, where it does not seem reasonable to the Court that either party should do so, or where a party is incompetent to do so, as in the case of an infant (*i*). As regards the estate of an infant, the Court will appoint a receiver without suit on petition or summons (*k*). A receiver may be appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just (*l*).

The principle upon which a receiver is appointed is for the preservation of property until the question between the parties claiming it shall have been decided, but without prejudice to the right of possession of a party claiming by an interest paramount to the litigants (*m*). In the case of infants the Court considers

(*e*) *Isaac* v. *Compertz*, 1 Ves. 44. If the sum to be paid out is over £1,000 the application must be by petition. *Re Coore* (1883), W. N. 169. If under that amount, by originating summons. R. S. C. Ord. LV. r. 2 (2).

(*f*) *Re Dangar's Trusts*, 41 Ch. D. 178; 58 L. J. Ch. 315.

(*g*) *Angel* v. *Smith*, 9 Ves. 335.

(*h*) *Sharp* v. *Carter*, 3 P. Wms. 379; *Portman* v. *Mill*, 8 L. J. Ch. 161.

(*i*) Dan. Ch. Pr. 1664.

(*k*) *Re Leeming*, *Re Gascoigne*, 20 L. J. Ch. 550. This is an exception to the usual rule.

(*l*) Judicature Act, 1873, s. 25, sub-s. 8.

(*m*) *Berney* v. *Sewell*, 1 J. & W. 648.

chiefly what will be most beneficial to their interests. In the following cases a receiver has been appointed (*n*): A receiver has been appointed where there is no guardian (*o*), or the guardian is abroad (*p*); where the trustees neglect to get in the personalty, so that the infant is deprived of maintenance (*q*); where the trustee is guilty of misconduct, or becomes bankrupt or insolvent (*r*); so, if he refuses to act (*s*); where the father insists on taking the profits of real estate and not applying them for the infant's benefit (*t*); where the tenant for life mismanages the estate, as by cutting timber improperly (*u*), or refusing to renew leases (*x*). The existence of a testamentary guardian is no objection to the Court appointing a receiver, as the precise extent of such a guardian's powers over the property of the infant is by no means certain, and he is frequently unable to act without the assistance of the Court (*y*). The same reasoning applies to a socage guardian, whose powers are the same as those of a testamentary one; unless, therefore, there are properly constituted trustees to manage an infant's real estates, the Court generally appoints either a receiver or a guardian of the estate who is in the nature of a receiver. Under special circumstances the trustee was appointed receiver with a salary; he had been receiver for many years, and the testator appointed him trustee; the estates being large, the Court continued him as receiver (*z*). Where infants are entitled to a share of property, and a receiver is appointed of the whole for their benefit, with the consent of the co-owners, the expense falls on the infants' shares (*a*).

Security.—As a rule, a receiver when appointed must give security for the proper performance of his duties (*b*), which is usually double the amount of the annual income (*c*) or value of the property likely to be got in by him during the currency of his periodical account (*d*).

Duties and Liabilities.—Where a receiver has been appointed

(*n*) Simp. Inf. 436.
(*o*) *Hicks* v. *Hicks*, 3 Atk. 274.
(*p*) *Westby* v. *Westby*, 2 C. P. Coop. 210.
(*q*) *Richards* v. *Perkins*, 3 Y. & C. Exch. 299.
(*r*) Dan. Ch. Pr. 1670; *Waterlow* v. *Sharp* (1867), W. N. 64.
(*s*) *Palmer* v. *Wright*, 10 Beav. 234.
(*t*) *Kiffin* v. *Kiffin*, cited 1 P. Wms. 705.
(*u*) *Aburrow* v. *Aburrow*, 10 Sim. 602.
(*x*) *Bennet* v. *Colley*, 5 Sim. 181, 192.
(*y*) *Gardner* v. *Blane*, 1 Ha. 381.
(*z*) *Bury* v. *Newport*, 23 Beav. 30.
(*a*) *Smith* v. *Lyster*, 4 Beav. 227.
(*b*) R. S. C. 1883, Ord. L. r. 16.
(*c*) Set. Judg. & Ord. 654.
(*d*) Dan. Ch. Pr. 1687.

to real estate, the tenants (if any) are ordered to attorn to him, and to pay him their rents in arrear, as well as the growing rents (*e*). After a tenant has attorned, the receiver may distrain in his own name for rent accrued during such tenancy (*f*); he may distrain at his own discretion for rent in arrear within the year, but if in arrear for more than a year, then an order of the Court is necessary (*g*). For his further powers of letting and demising, see Daniel's Chancery Practice (*h*). The receiver may expend small sums on such matters as ordinary repairs without leave (*i*); but if a large outlay is required, recourse must be had to the Court for leave (*k*), and he should not defend an action without such leave (*l*).

It is the duty of a receiver appointed to get in outstanding personal estate, to get in all that he can reach, and the Court will assist him in enforcing the claims (*m*). A receiver should not attempt to bring an action to recover a debt without the consent of the Court (*n*). When he has got it in, it is his duty to pay it into Court at the appointed times; he must not pay anything out without the order of the Court; for he "has no right *ex mero motu* to apply the money in his hands in payment of debts due either to himself or to other persons; he has no right to apply such moneys otherwise than as the Court or tribunal appointing him may direct" (*o*); but where he is ordered to keep down incumbrances, or make any other payments, he must comply with such order, and the sums so paid by him will be allowed in his accounts (*p*).

He will be liable for any loss which may be occasioned to the estate by his wilful default, as by placing money in improper hands (*q*), or by so placing the fund as to deprive himself of absolute control over it (*r*); but where he has *bona fide* deposited the fund at his bankers to a separate account, under circum-

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(*e*) *Codrington* v. *Johnstone*, 1 Beav. 520, 524; *Hobson* v. *Sherwood*, 19 Beav. 575.
(*f*) Woodf. L. & T. 548.
(*g*) *Brandon* v. *Brandon*, 5 Madd. 473.
(*h*) Pp. 1486 *et seq.*
(*i*) *Thornhill* v. *Thornhill*, 14 Sim. 600.
(*k*) Dan. Ch. Pr. 1488.
(*l*) *Bristowe* v. *Needham*, 2 Ph. 190.
(*m*) Dan. Ch. Pr. 1701.
(*n*) See *Re Hopkins*, *Dowd* v. *Hawtin*, 19 Ch. D. 61.
(*o*) Per Kindersley, V.-C., in *Coope* v. *Cresswell*, L. R. 2 Eq. 106, 115; 35 L. J. Ch. 496, 502.
(*p*) Dan. Ch. Pr. 1701.
(*q*) *Knight* v. *Lord Plimouth*, 3 Atk. 480.
(*r*) *Salway* v. *Salway*, 2 R. & M. 215; S. C. *White* v. *Baugh*, 3 Cl. & Fin. 44; *Wren* v. *Kirton*, 11 Ves. 377.

stances in which it could not properly have been paid into Court, he will not be liable for the failure of the bankers (*s*).

Discharge of Receiver.—A receiver cannot be discharged from his office without showing some reasonable cause for the change (*t*), and being appointed for the benefit of all parties, he will not be discharged on the *ex parte* application of the party at whose instance he was appointed (*u*); nor where he has been appointed on behalf of infant tenants in common, will he be discharged as to the share of one of them who has attained twenty-one (*x*). A receiver may be discharged from his office on an application made by petition, motion, or summons (*y*), and his recognizances will be vacated on proper affidavit of payment to the party entitled to receive the balance, or on the Chancery paymaster's or Master's certificate (*z*); but in the case of a receiver appointed to an infant's estate, his recognizances will not be vacated till a year after the infant has attained his majority (*a*). Since a receiver is in a fiduciary position towards those for whose money and property he has to account, he cannot, in respect of such money or property which he has not accounted for, and which is due from him, avail himself of the Statute of Limitations, though his final account has been passed, and his recognizances vacated (*b*).

Passing Accounts.—A receiver must pass his accounts at the proper times fixed for him to do so; and if he neglect this duty, he will have his salary disallowed (*c*), and be charged with compound interest (*d*); so, too, he will be charged with interest on money improperly retained by him, even though his accounts have been passed as satisfactory (*e*).

(*s*) *Salway* v. *Salway* (*ubi sup.*).
(*t*) See *Richardson* v. *Ward*, 6 Madd. 266.
(*u*) *Faulkner* v. *Daniel*, 3 Ha. 204.
(*x*) *Smith* v. *Lyster*, 4 Beav. 227.
(*y*) Dan. Ch. Pr. 1716.
(*z*) Set. Judg. & Ord. 679.
(*a*) See 2 Madd. Ch. Pr. 298, and *Kilbee* v. *Sneyd*, 2 Moll. 233.
(*b*) *Seagram* v. *Tuck*, 18 Ch. D. 296; 50 L. J. Ch. 572.
(*c*) *Potts* v. *Leighton*, 15 Ves. 273.
(*d*) *Hicks* v. *Hicks*, 3 Atk. 274; *Potts* v. *Leighton* (*ubi sup.*).
(*e*) *Fletcher* v. *Dodd*, 1 Ves. 85.

CHAPTER VII.

RIGHTS OF THE WARD ON THE TERMINATION OF THE GUARDIANSHIP.

Duty of Guardian to Account. -A guardian who is appointed by the Court to the estate of an infant (whether appointed also to his person or not) ordinarily gives security to account for the rents and profits of the ward's estate received by him, and the Court can fix the amount of the security and the times at which he is to render his accounts, and in this respect the guardian of the estate is in the position of a receiver; and he passes his account in the same manner as a receiver (*a*). When the ward of Court comes of age he will be put in possession of his property on bringing the fact of his attaining his majority properly before the Court.

But where there is a guardian or trustee of the estate of an infant who has not been appointed by the Court, the ward ought to be put by his guardian into possession of his property on attaining his majority, and to have an account of its management rendered to him. On the other hand, the guardian is entitled to be discharged and released of his duties on the termination of his office (*b*). The Court will look with considerable suspicion upon a release that has been granted within a few days of the ward's coming of age (*c*), and will set it aside unless the ward can be shown to have fully understood the accounts (*d*); for such release, to be binding, must be made by the ward with full information as to what his rights are (*e*), and without any undue pressure (*f*). Where the accounts have been settled a reasonable time after the ward has attained his majority, the Court would require special circumstances to be shown before

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(*a*) Dan. Ch. Pr. 1120, 1703.

(*b*) It is usual to give this release to the guardian, but it is a matter of some doubt whether in strict law he is entitled to his formal under seal release. Lewin, 411.

(*c*) *Steadman* v. *Palling*, 3 Atk. 423.

(*d*) *Wedderburn* v. *Wedderburn*, 4 Myl. & Cr. 41.

(*e*) *Walker* v. *Symonds*, 3 Swanst. 1.

(*f*) *Lloyd* v. *Attwood*, 3 De G. & J. 614.

it would set them aside (*g*). Even before the ward attains twenty-one, and mismanagement is suspected, he is entitled to call his guardian to account. By the Judicature Act, 1873 (*h*), all causes and matters for taking accounts are assigned to the Chancery Division.

The principle upon which the Court acts is, that the guardian of the estate is a trustee who must faithfully perform the trust reposed in him towards his infant *cestui que trust*, and is therefore bound to render an exact account of the discharging of his office. But to this rule there is a species of exception; thus, where an allowance has been ordered by the Court for the maintenance of an infant, the guardian is so far confided in, that he is not bound to account specifically for that allowance. But if a fraud is practised on the Court, as if a guardian, getting £100 a year, maintains the infant at the rate of only £20, the Court will check any such abuse by making an order on the guardian to account for the application of the maintenance money (*i*).

One guardian is not discharged by evidence of payment of income of trust fund to his co-guardian for the support of the infant ward, but he is not to be bound to vouch the items of expenditure if the ward has been properly maintained and educated, having regard to the sum expended (*k*).

Suspected Mismanagement.—In cases where mismanagement of the property is suspected, a stranger may bring the fact to the notice of the Court, which may order an examination of the accounts (*l*); and the accounting party cannot obtain an acquittance and discharge by merely paying into Court the funds to which the infant is entitled (*m*).

Protection of Ward after Attaining Majority.—The connection between guardian and ward is so close, the guardian's opportunities of acquiring knowledge of the ward's property, and influence over his mind, are so many and various, that where a man acts as guardian, or trustee in nature of guardian, for an infant, the Court is extremely watchful to prevent that person's taking any advantage, either by a hasty and ill-

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(*g*) *Lambert* v. *Hutchinson*, 1 Beav. 277.
(*h*) 36 & 37 Vict. c. 66, s. 34, sub-s. 3.
(*i*) Macph. Inf. 348; *Re Oldfield*, 2 Moll. 291.
(*k*) *Re Evans*, *Welch* v. *Channell*, 26 Ch. D. 58; 53 L. J. Ch. 709.
(*l*) See *Earl of Pomfret* v. *Lord Windsor*, 2 Ves. Sen. 472, 484, citing *Lord Dudley's Case*.
(*m*) *Bencraft* v. *Rich*, 1 Bro. C. C. 56.

considered settlement of accounts, or by way of direct bounty, immediately upon his ward or *cestui que trust* coming of age, and at the time of settling the account, or delivering up the trust. This rule is applicable wherever the connection and influence of guardianship has continued, though the ward may have been of age for some time before the date of the transaction. Undoubtedly, if after the ward or *cestui que trust* comes of age, and has been put into possession of the estate, he thinks fit, when *sui juris*, and at liberty, to grant a reward for care and trouble, the Court could never set aside such a transaction; but the Court guards against its being done at the very time of accounting and delivering up the estate as the terms on which the guardian will perform that duty; and so far has this vigilance been carried, that the relations of guardian and ward are in equity decisive against the validity of transactions which between strangers could not be impeached; and it is scarcely possible in the course of the connection of guardian and ward, any more than in that of attorney and client, or trustee or *cestui que trust*, that a transaction shall stand, purporting to be bounty for the execution of an antecedent duty (*n*).

Opening Settled Accounts.—In settling accounts out of Court, the protection afforded to infants is continued after they have attained twenty-one, until they have acquired all the information which might have been had in adult years; and accounts settled and releases given under the influence of those relations which exist between guardian and ward, or upon imperfect information, will not be allowed to stand (*o*). So, where accounts were settled between a guardian and his ward a few months after the latter came of age, and were signed by her without having been examined by any one on her behalf, and without any delivery of vouchers; the accounts, too, being applicable only to a part of the receipts and expenditure, and waived by the guardian's delivering a subsequent account, purporting to be an account from the commencement of the guardianship, the accounts settled between the guardian and ward were set aside (*p*). It is regarded as a suspicious circumstance that the accounts have been settled or a release given within a few days after the ward

(*n*) Macph. Inf. 260.
(*o*) *Ibid.* 350. See *Kilbee* v. *Sneyd*, 2 Moll. 186, 233.
(*p*) *Wych* v. *Packington*, 3 Bro. P. C. 44; and see *Mellish* v. *Mellish*, 1 L. J. Ch. 32, 120.

has attained his majority (*q*); and though an account has been settled and closed between the guardian and his ward, it will be ordered to be reopened where there is fraud, or there are errors, whether caused by mistake or fraud; and fewer errors will induce the Court to reopen the account where there is a fiduciary relation between the parties than where there is not (*r*); and where a fraudulent transaction is set aside as against the ward, he will be entitled to follow his property so fraudulently disposed of into the hands of third parties, who have notice, actual or constructive, of the fiduciary position of the guardian (*s*). After the death of the ward or *cestui que trust*, his representative may have the fraudulent transaction set aside (*t*). A guardian will be charged with interest on his ward's money retained in his hands, and it is no answer to say that no use has been made of it, for it is the duty of the guardian in his fiduciary capacity to employ his ward's estate and money to the best advantage (*u*).

Office Honorary and Gratuitous.—Guardians are allowed, on taking accounts, for all proper outgoings (*x*), and will be reimbursed all their necessary expenses, such as expenses out of pocket, if rightly incurred (*y*); but not where their conduct has been unreasonable and improper in incurring costs in bringing an action (*z*); and they cannot claim for remuneration for their personal toil and trouble, their office and duties being purely honorary and gratuitous. They are also not allowed to charge for expenses which may have been incurred by them in bringing up and educating their wards, unless the expenses are expressly authorized; for as they are not bound by any legal obligation to support them, they cannot make a legal claim to remuneration; but they should take steps to have a proper allowance made to them out of the ward's fortune for their maintenance and education. The rule enforcing the gratuitous nature of a guardian's office has been long established in England, for the old guardian in socage was only allowed his reasonable costs

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(*q*) *Steadman* v. *Palling*, 3 Atk. 423; *Revett* v. *Harvey*, 1 Sim. & S. 502; 2 L. J. Ch. 39.
(*r*) Dan. Ch. Pr. 484.
(*s*) Lewin, chap. xxx.
(*t*) See *Aylward* v. *Kearney*, 2 Ba. & B. 463.
(*u*) *Dawson* v. *Massey*, 1 Ba. & B. 219.
(*x*) *Rex* v. *Sutton*, 3 Ad. & El. 597; 4 L. J. K. B. 215.
(*y*) Lewin, 770. Settled Land Act, 1925, s. 100.
(*z*) *Re England's Settlement Trusts, Dobb* v. *England*, [1918] 1 Ch. 24; 87 L. J. Ch. 73.

and expenses when called upon to account for his office (*a*). The rule applies to solicitors who have been appointed trustees. A solicitor who is a trustee, whether expressly or constructively, cannot charge for his professional labours, but will be allowed only his costs out of pocket (*b*), unless there be a special contract or direction to that effect (*c*). It was formerly held that even then he could not charge for matters not strictly professional (*d*); but in a case where a testator appointed his solicitor one of his trustees and executors, and declared that it should be lawful for any of his trustees or executors who might be a solicitor to transact any business occasioned by the trusts or provisions of his will, whether such business was usually within the business of a solicitor or not, and that he should be allowed to make the usual professional or other proper or reasonable charges for all business done and time expended in relation thereto, notwithstanding his being a trustee or executor, and the solicitor-trustee carried in for taxation a bill in which he made some charges for business done by him not of the nature of the ordinary professional business of a solicitor, the taxing-master disallowed all such charges. North, J., however, held that under the terms of the will he was entitled to make such charges, and referred the matter back to the master to review his taxation (*e*).

Ward Electing to be Bound.—There is no rule of law preventing infant wards on coming of age from ratifying and confirming the acts of their guardians, and the transactions of a guardian on behalf of his infant ward are valid, if within the scope of his general powers, or authorized by the Courts of equity; they are sustainable though neither within the scope of his powers nor previously authorized, if the Court afterwards deems them prudent or beneficial to the ward; in other cases, subject to the ward's own disaffirmance on reaching majority. Herein consists the infant's right of election. The general rule as to election recognizes two principles: first, the privilege of the infant ward, on attaining full age, to avoid his guardian's transaction; secondly, the right of Courts of equity to control this privilege by interposing to pronounce the transaction good. The

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(*a*) Litt. 123. "Salvis ipsis custodibus rationabilibus misis suit." 52 Hen. III. c. 17, Statute of Marlbridge. See *Home* v. *Pringle*, 8 Cl. & Fin. 264, 287, per Lord Cottenham; and *Barrett* v. *Hartley*, L. R. 2 Eq. 789.
(*b*) *Broughton* v. *Broughton*, 24 L. J. Ch. 190.
(*c*) *Re Sherwood*, 3 Beav. 338.
(*d*) *Harbin* v. *Darby*, 2 L. T. 531.
(*e*) *Re Ames*, *Ames* v. *Taylor*, 25 Ch. D. 72

whole doctrine, therefore, seems in strict accordance with that more general rule, that the accounts of the guardian are open to the inspection of the ward at majority, and may be disputed down to the smallest item. These principles suffice for general application to compromises, submissions to arbitration, investments and re-investments of personal property, and similar transactions, undertaken by the guardian on the strength of a previous order of Court, or at the risk of its subsequent approval (*f*). Thus, there are many acts and transactions in reference to the ward's property which when done by the guardian may be disaffirmed by the ward on coming of age, but which may be equally confirmed by him; but he must have full knowledge of the effect of his confirmation (*g*); and if the original act be fraudulent the alleged confirmation of it will be keenly scrutinized (*h*). If the guardian improperly deal in his own name with his ward's property, a resulting trust in favour of the ward at once arises; and the latter may, on attaining majority, elect to keep the property in the form in which he finds it. If the ward does not ratify an unauthorized investment the guardian will become liable for any loss that may accrue. All advantageous bargains which a guardian makes with the ward's funds are also considered subject to the ward's election either to repudiate or to uphold the contract and take the profits. This applies, in general, to improper acts, as where the guardian speculates with the trust funds, or invests them in his own business, or, in a word, converts them to his own use; and the ward may either take the investment as he finds it, with all the profits, or demand the original fund with interest (*i*).

Breach of Trust.—In *Docker* v. *Somes* (*k*), Lord Brougham laid down the following equitable principles on this subject: "Wherever a trustee, or one standing in the relation of a trustee, violates his duty, and deals with the trust estate for his own behoof, the rule is, that he shall account with the *cestui que trust* for all the gain which he has made. Thus, if trust money is laid out in buying and selling land, and a profit made by the transaction, that shall not go to the trustee who has so applied the money, but to the *cestui que trust*, whose money has been thus applied. In like manner (and cases of this kind are more numerous), where a trustee or executor has used the fund com-

(*f*) Sch. Dom. Rel. s. 385.
(*g*) *Kay* v. *Smith*, 7 H. L. Cas. 750
(*h*) *Morse* v. *Royal*, 12 Ves. 355.
(*i*) Sch. Dom. Rel. s. 386.
(*k*) 2 Myl. & K. 655, 664.

mitted to his care in stock speculations, though the loss, if any, must fall upon himself, yet for every farthing of profit he may make he shall be accountable to the trust estate. So, if he lay out the trust money in a commercial adventure, as in buying or fitting out a vessel for a voyage, or put it in the trade of another person, from which he is to derive a certain stipulated profit, although I will not say that this has been decided, I hold it to be quite clear that he must account for the profits received by the adventure or from the concern. In all these cases it is easy to tell what the gains are; the fund is kept distinct from the trustee's other moneys, and whatever he gets, he must account for and pay over. It is so much fruit, so much increase on the estate or chattel of another, and must follow the ownership of the property and go to the proprietor. So it is also where one not expressly a trustee has bought or trafficked with another's money. The law raises a trust by implication, clothing him, though a stranger, with the fiduciary character, for the purpose of making him accountable. If a person has purchased land in his own name with my money there is a resulting trust for me; if he has invested my money in any other speculation without my consent, he is held a trustee for my benefit; and so an attorney, guardian, or other person standing in a like situation to another, gains not for himself, but for the client, or infant, or other party whose confidence has been abused." Improper dealings with the ward's property will be set aside as against innocent third parties, unless acquiesced in by the ward on attaining his majority.

Acquiescence after Attaining Majority.—Since, then, the position of guardian and ward is fiduciary, the right of the ward to open up accounts between them is not barred by the Statute of Limitations (*l*), but lasts as long as that relationship exists between them (*m*), and the account may be taken from its commencement (*n*). But after the fiduciary relationship is at an end, then the guardian may avail himself of the Trustee Act, 1888 (*o*), which gives him the rights and privileges of the

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(*l*) *Mathew* v. *Brise*, 14 Beav. 341. See 36 & 37 Vict. c. 66, s. 25 (2), which provides that "no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be bound by any Statute of Limitations."

(*m*) *Aylward* v. *Kearney*, 2 Ba. & B. 463.

(*n*) *Wedderburn* v. *Wedderburn*, 4 Myl. & Cr. 41.

(*o*) 51 & 52 Vict. c. 59.

Statutes of Limitation (*p*), of pleading lapse of time in any action or other proceeding brought against him for breaches of trust, except where the claim is founded upon any fraud or fraudulent breach of trust to which he was a party or privy, or is to recover trust property, or the proceeds thereof still retained by him, or previously received by him and converted to his own use (*q*). This privilege is applicable to actions or proceedings for taking the accounts of guardians or trustees (*r*). A retiring trustee is liable for a breach of trust committed by his successor, if such breach was not only the outcome or rendered easy, but was contemplated by the former trustee when he retired and his successor was appointed (*s*). Trustees who have committed a breach of trust and have caused a loss by investing trust funds in an unauthorized security cannot require their *cestui que trust* when an infant to transfer the unauthorized security to them in order to indemnify themselves against the loss caused by their breach of trust (*t*). As between co-trustees, the defence of the Statute of Limitations does not begin to run until the claim of the *cestui que trust* has been established against one of them (*u*). During infancy the ward cannot in any way authorize a breach of trust (*x*), but he may be bound by acquiescence after attaining twenty-one (*y*). Acquiescence is no bar to a claim by the ward to set aside a release while the relation of trustee and *cestui que trust* or the influence caused by it continues, or the circumstances remain unaltered under which the transaction in question took place (*z*). This protection is not confined merely to infant wards, but where the fiduciary relationship is carried on after the latter have attained their majority; for where a guardian, after his ward attains full age, continues to manage the property at the request of the ward, and before the account of his receipts and payments during minority are settled, it is, in effect, a continuance of guardianship as to the property; and he must account on the same principle as if they were transactions during the minority; and

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(*p*) Sect. 8 (*a*). See *Re Davies, Ellis* v. *Roberts*, [1898] 2 Ch. 142; 67 L. J. Ch. 507.
(*q*) Sect. 8 (1).
(*r*) *Re Page, Jones* v. *Morgan*, [1893] 1 Ch. 304; *How* v. *Earl Winterton*, [1896] 2 Ch. 626; 65 L. J. Ch. 832.
(*s*) *Head* v. *Gould*, [1898] 2 Ch. 250; 67 L. J. Ch. 480.
(*t*) *Ibid.*
(*u*) *Robinson* v. *Harkin*, [1896] 2 Ch. 415; 65 L. J. Ch. 773.
(*x*) *Overton* v. *Bannister*, 3 Ha. 503.
(*y*) See *Steadman* v. *Palling*, 3 Atk. 423.
(*z*) *Wedderburn* v. *Wedderburn*, 4 Myl. & Cr. 41.

under such circumstances an injunction will be granted (on terms) to restrain a guardian from proceeding in an action to recover the balance claimed by him on account of the transactions after his ward comes of age (*a*). But a ward, after attaining twenty-one, by acquiescence in or confirming the acts of the guardian, may be barred from obtaining any relief against them; but such acquiescence or confirmation must be accompanied by a full knowledge of his rights on the part of the ward (*b*).

What is Acquiescence.—There are two kinds of acquiescence: First, direct, where the act complained of was done with a full knowledge and express approbation of another, in which case a Court of equity will not allow that other to seek relief against the very transaction to which he was himself a party. Secondly, indirect, where a person having a right to set aside a transaction, stands by and sees another dealing with property in a manner inconsistent with that right, and makes no objection; when also a Court of equity will not relieve. Where, however, the act complained of has been completed without any knowledge or assent on the part of the person seeking relief, there can be no acquiescence in the strict sense of the word, which has been defined as "quiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct. When once the act is completed without any knowledge or assent upon the part of the person whose right is infringed, a right of action has vested in him, which, at all events as a general rule, cannot be divested without accord and satisfaction, or release under seal. Mere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right, although under the name of laches it may afford a ground for refusing relief under some particular circumstances" (*c*).

Laches.—Laches on the part of the ward after coming of age will, if it is gross, disentitle him to relief, but mere knowledge of his rights of a few years' standing, as, for instance, three or ten years, will not take away his right to impeach the transaction (*d*).

(*a*) *Mellish* v. *Mellish*, 1 L. J. Ch. 32, 120.
(*b*) *Earl of Pomfret* v. *Lord Windsor*, 2 Ves. Sen. 484; *Kay* v. *Smith*, 7 H. L. Cas. 750.
(*c*) Per Thesiger, L.J., in *De Bussche* v. *Alt*, 8 Ch. D. 314; 47 L. J. Ch. 381.
(*d*) *Ibid.*, and the cases there cited.

Gifts by Ward to Guardian.—It is a maxim of equity that the guardian must not use his influence with the ward for the purpose of obtaining benefits at his hands; consequently, transactions of such a nature are closely scrutinized; and the Court, if it deems proper, will not hesitate to set them aside, where the natural influence of the one has been exercised over the other; for a guardian cannot take anything from his ward pending the guardianship, or at the close of it, or at any period until his influence has ceased to exist (*e*). The Court will not, of course, undertake to set aside every gift that a ward may make to his guardian, but the rule is that where a person standing in the relation of guardian to ward takes a gift from, or makes a bargain with the latter, the proof lies upon him that he has dealt with him exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, and bringing everything to his knowledge which he himself knew (*f*). It is an element of undue influence that the ward had not independent advice as to the nature and effect of the transaction into which he has entered. The connection between guardian and ward is so close, the guardian's opportunities of acquiring knowledge of the ward's property and influence over his mind are so many and various, that where a man acts as guardian, or trustee in nature of a guardian, for an infant, the Court is extremely watchful to prevent that person taking any advantage, either by a hasty and ill-considered settlement of accounts, or by way of direct bounty, immediately upon his ward or *cestui que trust* coming of age, and at the time of settling the account, or delivering up the trust. This rule is applicable wherever the connection and influence of guardianship has continued, though the ward may have been of age some time before the date of the transaction (*g*). But where an infant lives with a relative, who is not in the position of a guardian, nor exercises any undue influence, he may make a gift to that relative a few months before death, and the gift will be upheld (*h*). Though a gift made to a person standing in a fiduciary relation to the donor may be voidable, yet if, after the confidential relation has ceased to exist, the donor

(*e*) Per Lord Eldon in *Wood* v. *Downes*, 18 Ves. 120, 127.
(*f*) Per Lord Brougham in *Hunter* v. *Atkins*, 3 Myl. & K. 113, 135.
(*g*) Macph. Inf. 260, 261.
(*h*) *Taylor* v. *Johnston*, 19 Ch. D. 603; 51 L. J. Ch. 879.

intentionally elects to abide by the gift, it cannot be impeached after his death, even though he were unaware of the voidable nature of the gift (*i*).

If, after the ward becomes of age and actually *sui juris*, and has been put into possession of his property, he chooses to make a gift to his guardian as a reward for the trouble and care expended on his behalf, the gift will not be set aside. But the Court, as before stated, looks with suspicious eyes on such transactions when done at the very time of accounting and delivering up the estate; and where it was claimed by the guardian as a bounty for the execution of his duty, the Court would not allow it to stand (*k*). So, where the gift is made or benefit conferred upon the guardian so soon after the ward comes of age that the influence derivable from the superior age and knowledge and experience of the guardian seems to have been exercised upon the youthful ward, the Court will relieve him from the pressure that has been put upon him. Thus, "where a man acts as guardian, or trustee in nature of a guardian, for an infant, the Court is extremely watchful to prevent that person's taking any advantage immediately upon his ward or *cestui que trust* coming of age, and at the time of settling account or delivering up the trust; because an undue advantage may be taken. It would give an opportunity either by flattery or by force, by good usage, or by bad usage imposed, to take such advantage; and therefore the principle of the Court is of the same nature with relief in this Court on the head of public utility, as in bonds obtained from young heirs, and rewards given to an attorney pending a cause, and marriage brocage-bonds. All depend upon public utility; and therefore the Court will not suffer it, though perhaps in a particular instance there may not be an actual unfairness. Upon that ground I went in the case cited (*l*); in which I have added at the end of my note taken at the hearing of the cause, *to be absolutely set aside, being between a guardian and his ward just come of age, and on reason of public utility. . . . The rule of the Court as to guardians is extremely strict*, and in some cases does infer some hardship, as where there has been a great deal of trouble, and he has acted fairly and honestly, that yet he shall have no allowance; but the Court

(*i*) *Mitchell* v. *Homfray*, 8 Q. B. D. 587; 50 L. J. Q. B. 460.
(*k*) *Hatch* v. *Hatch*, 9 Ves. 292.
(*l*) *Pierce* v. *Waring*, 1 Ves. Sen. 380.

has established that on great utility and necessity, and on this principle of humanity, that it is a debt of humanity that one man owes to another, as every man is liable to be in the same circumstances. Undoubtedly, if after the ward or *cestui que trust* comes of age, and after actually put into possession of the estate, he thinks fit, when *sui juris* and at liberty, to grant that or any other reasonable grant by way of reward for care and trouble, when done with eyes open, the Court could never set that aside; but the Court guards against doing it at the very time of accounting and delivering up the estate, as the terms; for the Court will not suffer them to make that the terms of doing their duty" (*m*).

Where a ward three months after coming of age conveyed an advowson to her guardian in consideration of the care he had taken of her, and the guardian's brother, a solicitor, prepared the deed, and fraud was alleged in that she only intended to convey the next presentation, on her application sixteen years later and after the death of the guardian (with whom an account had been settled), the conveyance was ordered to be set aside (*n*). In the course of his judgment Lord Eldon said: "'This case proves the wisdom of the Court in saying it is almost impossible in the course of the connection of guardian and ward, attorney and client, trustee and *cestui que trust*, that a transaction shall stand, purporting to be bounty for the execution of antecedent duty. There may not be a more moral act, one that would do more credit to a young man beginning the world, or afford a better omen for the future, than if, a trustee having done his duty, the *cestui que trust*, taking it into his fair, serious, and well-informed consideration, were to do an act of bounty like this. But the Court cannot permit it, except quite satisfied that the act is of that nature, for the reason often given, and recollecting that in discussing whether it is an act of rational consideration, an act of pure volition, uninfluenced, that inquiry is so easily baffled in a Court of justice; that instead of the spontaneous act of a friend, uninfluenced, it may be the impulse of a mind misled by undue kindness, or forced by oppression; the difficulty of getting property out of the hands of the guardian or trustee thus increased; and, therefore, if the Court does not

(*m*) Per Lord Hardwicke in *Hylton* v. *Hylton*, 2 Ves. Sen. 547, 548.
(*n*) *Hatch* v. *Hatch*, 9 Ves. 292.

watch these transactions with a jealousy almost invincible, in a great majority of cases it will lend its assistance to fraud; where the connection is not dissolved, the account not settled, everything remaining pressing upon the mind of the party under the care of the guardian or trustee" (*o*).

In *Aylward* v. *Kearney* (*p*), a man of weak understanding came of age on October 16, 1779, and within a fortnight from that time executed a lease of lands, at an inadequate rent, in favour of a son of his guardian. He married in 1780, and died in 1792, but continued during his life under the original dominion and control of the guardian and his family. His son came of age in 1807, and filed a bill in 1812 to have the lease set aside. The decree was in his favour, and the length of time was held, under the circumstances, no bar to his claim. In *Maitland* v. *Irving* (*q*), the plaintiff, having lost her mother when she was very young, was placed by her father under the care and protection of the defendant Maclean, her uncle by marriage, and had resided with him and his wife ever since. In 1842 her father died, and she being still an infant, and entitled to considerable property, Maclean was appointed her guardian by the Court of Chancery. In September 1844 she attained twenty-one. In January 1846, Maclean, who had agreed to pay £5,000 on the 25th of that month to Irving and Brown (who were partners as coal merchants) for the purchase of their business, &c., obtained and gave them the plaintiff's guarantee for the payment being made on February 14 then next, in consideration of their having consented to postpone the payment until that time. Afterwards another arrangement was made between Maclean and Irving and Brown, in pursuance of which the latter delivered up the guarantee, and Maclean procured and gave them the plaintiff's cheque for £3,000, &c. Under the circumstances the Court of Chancery granted and afterwards continued an injunction restraining the holders of the cheque from prosecuting an action against the plaintiff to recover the £3,000 (*r*). The Court not only enforces its controlling and correcting powers in cases where the parties are in the actual and full relationship to one another of guardian and ward, but where the person whose

(*o*) P. 296.
(*p*) 2 Ba. & B. 463.
(*q*) 15 Sim. 437.
(*r*) See also *Maitland* v. *Backhouse*, 16 Sim. 58, where the plaintiff was the same as in the case in the text, and the transaction of a similar nature.

influence has been unduly exercised is *in loco tutoris*, or *quasi*-guardian to the person affected and controlled by his influence. Thus, in *Archer* v. *Hudson* (*s*), a niece, two months after she came of age, and after her guardians had fully accounted to her, entered into a voluntary security for her uncle, by whom she had been brought up, and who was considered by the Court as standing *in loco parentis*. The Court set it aside.

When under Influence Presumed.—Two principles can be extracted from this case, namely, that where a transaction takes place between parent and child, just after the child has attained twenty-one, and prior to what may be called a complete emancipation, without any benefit moving to the child, the presumption is that an undue influence has been exercised to procure that liability on the part of the child, and a party seeking to maintain such a transaction must show that the presumption is adequately rebutted; and that, though Courts of equity do not interfere to prevent an act even of bounty between parent and child, yet they will see that the child is placed in such a position as will enable him to form an entirely free and unfettered judgment, independent altogether of any sort of control. So, where in one case a promissory note appeared to have been signed by a lady in her twenty-second year, as surety for her stepfather, in whose house she had been residing with her mother for many years previously, the Court restrained execution against her on a judgment obtained by the payee (*t*).

Continuing Influence.—This undue influence may be held to continue for many years after the actual or *quasi*-relation of guardian and ward has terminated, and the latter has passed his majority; and any transactions carried out between them in which that undue influence was brought to bear will be set aside. Accordingly, where the plaintiff, a young woman, who was living with her mother and stepfather in 1859, shortly after she came of age, at the solicitation of her stepfather, executed a bond as security to secure the repayment of a sum of money advanced by the defendant, payable at the end of six years. In 1866 the defendant brought an action and recovered judgment against the plaintiff's stepfather on the bond, and to avoid an execution, the plaintiff, who was then twenty-nine years of age, but who still resided principally with her stepfather, was induced by him to execute a second bond as surety to secure the amount

(*s*) 7 Beav. 551.

(*t*) *Espey* v. *Lake*, 10 Ha. 260.

of the judgment and costs. Both bonds were prepared by the stepfather's solicitor, and the plaintiff had no independent advice. In 1872 the defendant brought an action against the plaintiff on the bonds; she thereupon filed her bill to set them aside, and it was held by the Court that the second bond must be taken as connected with the first, and that, as there was no proof that the plaintiff was aware of the invalidity of the first bond, the execution of the second bond was not a confirmation of the first, and that both bonds must be set aside against her; and that, under the circumstances, she was not barred by laches, notwithstanding the time which had elapsed before she asserted her right to relief (*u*). But where the relationship between the guardian and the ward is totally at an end, and the influence that the one may have over the other is removed, gifts and conveyances between them may be maintained; and though it may be improper, and a suspicious thing for a guardian to purchase his ward's estate immediately upon his coming of age, yet if he gives full consideration for it, it is not voluntary, nor can it be set aside (*x*).

Where the fiduciary relationship of guardian and ward is at an end, and the latter after a lapse of more than six years brings an action against his guardian, but does not found his claim on fraud, or fraudulent breach of trust by the guardian, and the trust property or its proceeds sought to be recovered is not retained by the guardian, nor received by him and converted to his own use, then the guardian can plead the privilege of the statute to such an action (*y*).

(*u*) *Kempson* v. *Ashbee*, L. R. 10 Ch. App. 15; 44 L. J. Ch. 195; *Mellish* v. *Mellish*, 1 L. J. Ch. 32, 120.

(*x*) *Oldin* v. *Sambourn*, 2 Atk. 15.

(*y*) Trustee Act, 1888, s. 8 (1); *Re Page, Jones* v. *Morgan*, [1893] 1 Ch. 304; *How* v. *Earl Winterton*, [1896] 2 Ch. 626; 65 L. J. Ch. 832.

PART IV.

INFANTS.

CHAPTER I.

CAPACITIES, DISABILITIES, AND IMMUNITIES OF INFANTS.

Definition of Infant.—An infant (*a*), in the legal intendment of the term, is one that has not yet arrived at majority, which period in England is fixed for both sexes at twenty-one years, except for the Sovereign, who attains it at eighteen, though for legislative purposes the king is never in minority (*b*), but it is usual to appoint a guardian for him if of tender age. Popularly, an infant means one of tender age, who is quite incapable of taking care of himself, a child, in fact, under seven years of age; and one who has reached years of discretion but not attained majority is usually styled a minor, though the English law does not recognize any such distinction; and the "child of nineteen is as the child of five years old." (*c*). But, as will shortly be seen, in some respects the capacity of minors to transact their own and other persons' affairs is recognized. While there must of necessity be a fixed point at which children reach their full capacity in the eye of the law, yet before that point is reached they have in reality become competent and qualified to exercise many functions. Thus, infants who have arrived at a marriageable age may validly contract marriage (*d*); and if of the age of fourteen, and

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(*a*) Derived through the French "*enfant*" from the Latin, *infans* that is, one who cannot speak (*in fari*). Compare the Greek νήπιος.

(*b*) 1 Bl. Com. 248.

(*c*) Per Lord Hardwicke in *Hearle* v. *Greenbank*, 3 Atk. 695, 703; see also *Morgan* v. *Thorne*, 7 M. & W. 400.

(*d*) A girl of twelve and a boy of fourteen are deemed to have arrived at a stage of physical maturity which renders them capable of exercising a matrimonial discretion; and a marriage between the sexes at that age is not rendered invalid because of the want of age. If the marriage is between infants below that age, it is inchoate or imperfect, and may be set aside. See *ante*, Husband and Wife, chap. iii. pp. 34 *et seq.*

entitled to do so, they may appoint their own guardians; and if of the age of sixteen they may, under certain circumstances, elect, even as against their parents, to live apart from their control and custody. It has been, therefore, frequently found necessary to allow persons who had attained the age of discretion, but not full majority, to act as though they had attained it. The civil law did not permit the marriage of the minor to operate as an emancipation (*e*); nor does the English law in the case of a male (*f*); in the case of a female, it does operate to free her from the control of her natural or legal guardians so far as her person is concerned; if she marry without their consent, it is not so clear that their control of her property is terminated, and as under the Married Women's Property Act, 1882 (*f*), her property remains her own, and is unaffected by any marital rights, marriage will scarcely be deemed to be an emancipation of their control over her property. Where the infant is a ward of Court, her marriage is not allowed to end its authority either over her person or her property (*g*).

When Infant Comes of Age.—An infant comes of age on the commencement of the last day which completes his twenty-first year; for in English law *ultimus dies cœptus pro completo habetur*; in other words, the law takes no heed of a fraction of a day; thus, a man born on February 1, 1600, after eleven o'clock at night, was adjudged to be of full age after one o'clock in the morning of the last day of January, 1621 (*h*).

What Offices Infant may Fill.—During their minority infants are under disability, as lacking full judgment and mental capacity. But as regards acts which an infant may do, or offices he may fill, this disability does not prevail in all instances. Offices which require only skill and diligence he may fill and execute himself when arrived at the age of discretion, or he may appoint a sufficient deputy to exercise them. Thus, he may fill the offices of a park-keeper, gaoler, forester, &c. (*i*); he may also serve as an officer, or in the ranks, in the army or navy. He may at common law fill a purely ministerial office, as the clerkship of the peace, whether in person or by deputy (*k*); or one involving skill, such as the office of bishop's registrar (*l*).

(*e*) Dig. lib. 4, tit. 4, l. 2.
(*f*) *Re Mendes*, 1 Ves. Sen. 91.
(*g*) 45 & 46 Vict. c. 75.
(*h*) *Anon.*, 1 Salk. 44. See *Herbert* v. *Turball*, Keb. 589.
(*i*) Plowd. 379, 381; 9 Rep. 48, 97.
(*k*) *Crosbie* v. *Hurley*, 2 Alc. & Nap. 431.
(*l*) *Young* v. *Fowler*, Cro. Car. 555.

But as the Local Government Act, 1888 (*m*), provides that the clerk of the peace of a county is to be also clerk of the County Council, such office can no longer be said to be merely ministerial, and he has no longer power to appoint a deputy (*n*). Views as to efficient discharge of public offices by their occupants have undergone a change; therefore it may be assumed that no infant would at the present day be appointed to a responsible office. It was held long ago that if an infant were appointed to an office of skill which he did not fill, but to which he appointed an insufficient deputy, he forfeited the office (*o*).

An infant may be lord of a manor, and make grants of the copyhold land, for the estate of the copyholder is not derived out of the estate or interest of the lord of the manor, for he is but an instrument to make the grant (*p*). He may be a partner, but, generally speaking, when he comes of age he may disaffirm past transactions, if he do so unequivocally and soon after attaining his majority (*q*). He may likewise be a shareholder, though he may be rejected by the company on ascertaining the fact of his infancy (*r*). So, too, he may be appointed executor, though he is not liable for any *devastavit* committed by him or his co-executor; and if he be sole executor, a guardian *durante minore ætate* is appointed to administer the estate on his behalf (*s*); but if he is appointed co-executor with adults who prove, he may come in and act on attaining majority without further probate (*t*). He may be an agent and bind his principal by his acts (*u*).

What Offices Infant may not Fill.—But offices which may, broadly speaking, be said to import the exercise of discretion, he cannot fill, nor can he hold any office of public or pecuniary trust (*x*). Thus, he cannot be a guardian (*y*), sheriff's bailiff (*z*), factor, or receiver (*a*), or an acting executor or administrator (*b*), or priest, deacon (*c*), barrister, solicitor, or attorney for another

(*m*) 51 & 52 Vict. c. 41, s. 83. (*n*) *Ibid.* sub-s. 4.
(*o*) *Young* v. *Fowler* (*ubi sup.*).
(*p*) *Swayne's Case*, 8 Rep. 63.
(*q*) *Goode* v. *Harrison*, 5 B. & Ald. 147.
(*r*) *Symon's Case*, L. R. 5 Ch. App. 298; *Re Gardner, Long* v. *Gardner*, 67 L. T. 552.
(*s*) Supreme Court of Judicature Act, 1925, s. 165.
(*t*) *Cummins* v. *Cummins*, 8 Ir. Eq. Rep. 723.
(*u*) Co. Litt. 52 a.
(*x*) *Claridge* v. *Evelyn*, 5 B. & Ald. 81.
(*y*) Vin. Abr. Guardian [B].
(*z*) *Cuckson* v. *Winter*, 2 M. & R. 313.
(*a*) F. N. B. 118; Roll. Abr. 117.
(*b*) 1 Wms. Exors. 159; 38 Geo. III. c. 87, s. 6.
(*c*) 44 Geo. III. c. 43.

in a suit, physician, surgeon, or apothecary (*d*). An infant cannot be a juror (*e*), or sit or vote in either House of Parliament (*f*), or exercise the right of voting for a member of Parliament (*g*), or be enrolled as a burgess (*h*), town councillor (*i*), alderman (*k*), or mayor (*l*).

Under the Law of Property Act, 1925, the appointment of an infant to be a trustee in relation to any settlement or trust is void, but without prejudice to the power to appoint a new trustee to fill the vacancy (*m*); and under the Trustee Act, 1925, where a trustee is an infant, the persons who have power to appoint under the instrument creating the trust, or failing them the surviving or continuing trustees or trustee, or the personal representatives of the last surviving or continuing trustee, may by writing appoint one or more other persons whether or not being the persons exercising the power (*n*).

Wills.—An infant cannot now make a will, for by the Wills Act, 1837 (*o*), it is enacted that "no will made by any person under the age of twenty-one years shall be valid." This applies equally to personal and real estate. An exception is, however, made in favour of an infant soldier being in actual military service, or any mariner or seaman at sea (*p*), and soldier includes a member of the Air Force (*q*).

The Wills Act, 1837, provides that any soldier being in actual military service may dispose of his personal estate as he might have done before the Act (*r*), and a bequest of the personal estate, or any bequest of personal property described in a general manner, shall be construed to include any personal estate which he may have power to appoint and shall operate as an execution

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(*d*) Co. Litt. 128 a.
(*e*) 6 Geo. IV. c. 50, s. 1.
(*f*) 1 Bl. Com. 162. There have been instances in which minors have been returned to Parliament; and the latest most memorable case was that of C. J. Fox, who was returned for Midhurst eighteen months before he attained his majority; and his return was not invalidated.
(*g*) 7 & 8 Wm. III. c. 25, s. 8. See 48 Vict. c. 15; and *Hargreaves* v. *Hopper*, 1 C. P. D. 195; 45 L. J. C. P. 105.
(*h*) 45 & 46 Vict. c. 50, s. 9 (2) a.
(*i*) *Ibid.* s. 11 (2) a.
(*k*) *Ibid.* s. 14 (3).
(*l*) *Ibid.* s. 15 (1).
(*m*) 15 Geo. V. c. 20, s. 20.
(*n*) 15 Geo. V. c. 19, s. 36 (1).
(*o*) 1 Vict. c. 26, s. 7.
(*p*) *Ibid.* s. 11. *In the goods of Hiscock*, [1901] P. 78; 70 L. J. P. 22. See this case for what is "actual military service"; also *Gattward* v. *Knee*, [1902] P. 99; 71 L. J. P. 34.
(*q*) Wills (Soldiers and Sailors) Act, 1918, s. 5 (2).
(*r*) Sect. 11.

of such power unless a contrary intention appears by the will (*s*).

Deprivation of Immunity.—An infant is regarded with especial favour in the eye of the law; thus it has been said: "An infant in all things which sound to his benefit shall have favour and preferment in law as well as another, but shall not be prejudiced by anything to his disadvantage" (*t*). So "a deed will pass an interest to an infant even when coupled with a liability, if it be for his benefit to accept it" (*u*). An infant cannot by any act of his own alter his status, so as to deprive himself of its immunities, except in such cases as where he fraudulently represents himself to be of age, and obtains possession of property through such misrepresentation (*x*). For his immunities in actions brought by or against him, see chap. vii.

Responsibility for Criminal Acts.—An infant under the age of seven has an absolute immunity in respect of liability for crime. Under that age he is considered in law to lack sufficient reason to be rendered accountable or answerable for his acts. Between *seven* and *fourteen* he is liable for his criminal acts if express malice on his part can be shown, because, as the maxim has it, *malitia supplet ætatem*; in other words, his criminal intent proves that he is not lacking in mind, but only in years, but the evidence of that malice which is to supply age ought to be strong and clear beyond all doubt and contradiction (*y*). There is an exception to this rule in cases in which a charge of rape or the attempt to ravish (*z*) is made against youths under fourteen, who are by law deemed to be physically impotent and incapable of committing the crime, and no evidence is admissible to show that they could commit the offence, though they may be convicted upon the counts charging the minor offence (*a*); thus, a male under fourteen cannot be convicted of having carnal knowledge of a girl under thirteen (*b*), though he may be convicted of an indecent assault on her (*c*). This question of malice supplying age is one of fact. After the infant has attained fourteen, the legal presumption in

(*s*) Sect. 27. *Re Wernher, Wernher* v. *Beit*, [1918] 2 Ch. 82; 87 L. J. Ch. 255.
(*t*) *Bassett's Case*, Dyer, 136 a, 137 a.
(*u*) Per Page Wood, L.J., in *Lumsden's Case*, L. R. 4 Ch. App. 31, 38.
(*x*) See *Ex parte Jones, Re Jones*, 18 Ch. D. 109; 30 L. J. Ch. 673.
(*y*) 4 Bl. Com. 24.
(*z*) See *Reg.* v. *Williams*, [1893] 1 Q. B. 320; 62 L. J. M. 69.
(*a*) *Reg.* v. *Phillips*, 8 C. & P. 736; *Rex* v. *Groombridge*, 7 C. & P. 582.
(*b*) *Reg.* v. *Waite*, [1892] 2 Q. B. 600; 61 L. J. M. C. 187.
(*c*) *Reg.* v. *Williams* (*ubi sup.*).

his favour disappears, and he is as fully responsible for his criminal acts as though he were an adult; thus, if he fraudulently convert goods which have been delivered to him under an agreement for their hire, he can be convicted of larceny as a bailee (*d*). Where an act is made treason or felony, it extends as well to infants, if arrived at years of legal capacity, as to adults, unless there is a provision in the statute expressly excepting them (*e*). If the offence charged against an infant in the indictment be a mere non-feasance, then in some cases he shall be privileged by his nonage, if under twenty-one, because laches ought not to be imputed to an infant (*f*).

Punishment for Offences.—Under the Summary Jurisdiction Act, 1879 (*g*), as amended by the Children Act, 1908, a "child," that is, an infant under twelve, if summarily convicted of any of the offences specified in the first schedule of the Act, may be fined an amount not exceeding forty shillings (*h*). A "young person," that is, an infant between twelve and sixteen, may on like conviction be sent to prison for a term not exceeding three months, or fined an amount not exceeding £10 (*i*).

To save young children from contamination, degradation and the evil surroundings of a prison, a superintendent or inspector of police or the officer in charge of the police station, pending his appearance before the Court, may release a person apparently under the age of sixteen charged with an offence (unless with homicide or other grave crime), on the recognizance of his parent or guardian, with or without sureties in such an amount as in the opinion of the officer will secure his attendance. The officer is not to release on bail if the child should be removed from association with a reputed criminal or prostitute (*k*). Charges against children or young persons are to be heard in a different building or room from that in which the Court ordinarily sits (*l*). A Court of summary jurisdiction has the power to order, when a child or young person before them is

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(*d*) *Reg.* v. *Macdonald*, 15 Q. B. D. 323.
(*e*) 4 Bl. Com. 24 n.
(*f*) Macph. Inf. 451. For a mere non-repair of a road or bridge an infant does not seem to be criminally liable by way of indictment. If he had a guardian in socage or other person in occupation of the land in question, who was in possession of the receipts and profits, the guardian or other person in possession would be criminally liable for the non-repair.
(*g*) 42 & 43 Vict. c. 49.
(*h*) Sect. 10, sub-s. 1.
(*i*) Sect. 11, sub-s. 1.
(*k*) Children Act, 1908, s. 94.
(*l*) Sect. 111.

remanded or committed for trial, that he should be remanded to a place of detention which it is the duty of police authorities to provide, either by arrangement with the occupiers of premises within or without the district, or by themselves establishing such places (*m*). A child is defined for the purposes of the Children Act, 1908, as under the age of fourteen and a young person as under the age of sixteen (*n*). The maintenance of such child is to be repaid to its custodian (*o*).

The conviction of a child or young person shall not be regarded as a conviction of felony for the purposes of any disqualification attaching to felony (*p*).

A child under fourteen is not to be sentenced to imprisonment or penal servitude for any offence, or committed to prison in default of payment of a fine, damages or costs; and a young person (under the age of sixteen) shall not be sentenced to penal servitude for any offence, nor to imprisonment for an offence or in default of payment of a fine, damages or costs, unless the Court certifies that he so unruly that he cannot be detained in a place of detention, or that he is of so depraved a character that he is not a fit person to be so detained (*q*). Sentence of death is not to be pronounced on or recorded against a child or young person, but he is to be sentenced to be detained during His Majesty's pleasure (*r*). On conviction of an attempt to murder, or of manslaughter, or of wounding with intent to do grievous bodily harm, where the Court is of opinion that no punishment authorized under the Children Act, 1908, is sufficient, the offender may be sentenced to be detained for such period as may be specified in the sentence in such place as the Secretary of State may direct (*s*). Custody in detention is the substituted punishment where an adult would be sentenced to penal servitude or imprisonment (*t*).

Where a child or young person is found guilty of an offence, the Court may dismiss the charge, discharge the offender on a recognizance or place him on probation, commit him to the care of a relative or other fit person, send him to an industrial or reformatory school, order him to be whipped, order him or his parent or guardian to pay a fine, damages and costs, or the parent or guardian to give security for his good behaviour,

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(*m*) Children Act, 1908, s. 108.
(*n*) Sect. 131.
(*o*) Sect. 110.
(*p*) Sect. 100.
(*q*) Sect. 102.
(*r*) Sect. 103.
(*s*) Sect. 104.
(*t*) Sect. 106.

or commit him to custody in a place of detention, or, where the offender is a young person, sentence him to imprisonment (*u*).

Determination of Age.—Where a person is brought before a Court otherwise than for the purpose of giving evidence, the Court is to make due inquiry and take such evidence as is forthcoming at the hearing, but an order or judgment is not to be invalidated by subsequent proof that the age of the child has not been correctly stated (*x*).

Evidence of Infants.—There is no fixed age or limit for the reception of the evidence of infants; their competency as witnesses is based upon understanding and not upon age. Their evidence will be received if the presiding judge is satisfied that they understand the binding obligation of an oath (*y*), or that punishment will follow on their telling a lie. Thus, if a child under seven seems to understand the nature of an oath, and to have received a just impression of the facts to which he is deposing, and to be relating them truly, then his evidence ought not to be rejected (*z*). In *Brasier's Case* (*a*), which was an indictment for assaulting with intent to ravish an infant about five years old, all the judges held that she might have been examined on oath, if on strict examination she had been found to comprehend the danger and impiety of falsehood. But the dying declarations of a child only four years old were rejected on the ground that however precocious her mind might have been, it was quite impossible that she could have had sufficient understanding to render her declarations admissible (*b*).

The evidence must be given upon oath (*c*). Children who are deemed too young to take an oath, but not too young to know the duty of speaking the truth, may give evidence, in cases of girls for offences against them under the Criminal Law Amendment Act, 1885 (*d*); and young children generally for offences committed against them under the Children Act, 1908, but not on oath. Such evidence must be corroborated by some other material evidence in support of the charge (*e*), and must be

(*u*) Children Act, 1908, s. 107.
(*x*) Sect. 123.
(*y*) *Rex* v. *Williams*, 7 C. & P. 320; *Reg.* v. *Holmes*, 2 F. & F. 788.
(*z*) See Indian Evidence Act, 1872, s. 118, which enacts that "all persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to their questions by tender years," &c.
(*a*) 1 East P. C. 443; S. C. B. N. P. 293.
(*b*) *Rex* v. *Pike*, 3 C. & P. 598.
(*c*) *Rex* v. *Brasier* (*ubi sup.*).
(*d*) 48 & 49 Vict. c. 69, s. 4.
(*e*) 8 Edw. VII. c. 67, s. 30.

confined to offences created by the Acts (*f*). A child whose evidence is received in this manner and who wilfully gives false evidence (*g*) is liable to the punishment that might have been awarded had he been charged with perjury and the case dealt with summarily under section 10 of the Summary Jurisdiction Act, 1879.

A point which awaits judicial decision is whether an infant of tender years can make a declaration instead of taking the oath. The infant might claim himself to declare, or it might be claimed for him by his parent or guardian, on the ground that he belonged to a religious community the members of which objected to take an oath, or on the ground that he had no religious belief at all, or his evidence might be objected to on the latter ground. The difficulty is whether a child of so tender an age could properly be said to have any fixed idea one way or the other. Mr. Justice Stephen was of opinion that the infant's evidence or declaration ought to be received, if he evinced proof of understanding the necessity of telling the truth, and was capable of speaking truly to the facts to which he was called to depose (*h*); and he omitted want of religious belief in a child as a ground of incompetency (*i*); and held that section 4 of the Evidence Amendment Act, 1869 (*k*), applied *a fortiori* to a child who had received no instructions in a religious faith at all.

As to what weight should be given to the evidence of children, it has been observed, "that when the evidence of children is admitted, it is much to be wished, in order to render the evidence credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that a conviction should not be grounded on the unsupported accusation of an infant under years of discretion" (*l*). But this objection has been met by a writer on evidence (*m*), who has said that "independently of the sanction of an oath, the testimony of children, after they have been subjected to cross-

(*f*) *Reg.* v. *Paul*, 25 Q. B. D. 202; 59 L. J. M. C. 138.
(*g*) Children Act, 1908, s. 30 (2).
(*h*) Digest of the Law of Evidence, note xli. p. 168.
(*i*) *Ibid.* Art. 107, p. 110.
(*k*) 32 & 33 Vict. c. 68. By this section a person objecting to take the oath, or objected to as incompetent to take an oath, may be allowed to make a declaration, but is liable to be tried for perjury. Mr. Lely, the editor of the last edition of Best on Evidence (7th edit.), is of opinion that this section does not apply to the case of a young child, and it seems on good grounds.
(*l*) 4 Bl. Com. 214.
(*m*) Phillips on Evidence (8th edit.) p. 6.

examination, is often entitled to as much credit as that of grown persons; and what is wanted in the perfection of the intellectual faculties, is sometimes more than compensated by the absence of motives to deceive."

Infant may take Estate by Descent or Purchase.—An infant may inherit, and take under a will, purchase, grant, or surrender (*n*), with this qualification, that except the inheritance, he can always, where it is fair and just and to his advantage, repudiate. A gift to him cannot be recalled (*o*). A child *en ventre sa mere* can take in remainder (*p*), and where it is to his advantage shall be deemed to be *in esse* (*q*). Formerly where an estate vested in an infant by operation of law, and he did not disclaim, he was liable for rent, notwithstanding infancy (*r*); but now under section 26, sub-section 1 of the Settled Land Act, 1925, where an infant is beneficially entitled in possession to land for an estate in fee simple or for a term of years absolute, or would, if of full age, have the powers of a tenant for life, then during the minority of the infant, if the land is vested in a personal representative, the personal representative, and in every other case the trustees of the settlement, shall have all the powers conferred by the Act and the settlement on a tenant for life and on the trustees of the settlement. Copyholds may be surrendered to his use, and he may be admitted to them (*s*). He may, it is said, do homage, but not fealty (*t*), but he cannot perform grand serjeanty at the coronation (*u*). And generally, he may do as completely and irrevocably as a person of full age any right and lawful act which he is compellable by any means or in any way to do, albeit he doth it without suit of law (*x*).

The effect of the Statutes of Limitations in protecting the interests of infants will be discussed in a later chapter (*y*).

Child en ventre sa mere, when Deemed to be in Existence.—A child *en ventre sa mere* is deemed or presumed in law to be a child in being for many purposes. It is capable of having a legacy or surrender of a copyhold estate made to it; it may

(*n*) *O'Shanassy* v. *Joachim*, 1 App. Cas. 82; 45 L. J. P. C. 43.
(*o*) *Andrew* v. *Andrew*, 22 W. R. 684.
(*p*) 10 Wm. III. c. 22.
(*q*) *The George and Richard*, 3 A. & E. 466.
(*r*) *Kelly* v. *Coote*, 5 Ir. Rep. C. L. 469.
(*s*) Macph. Inf. 455.
(*t*) Co. Litt. 65 b.
(*u*) *Ibid.* 107 b.
(*x*) *Ibid.* 172 a.
(*y*) *Post*, chap. vi.

have a guardian assigned to it, and is enabled to have an estate limited to its use, and to take afterwards by such limitation (*z*), subject only to the provision of section 27, sub-section 3 of the Settled Land Act, 1925, that a legal estate is not to be vested in an infant.

Rule against Perpetuities.—Where the rule against perpetuities comes in question, there is no fixed rule of construction which compels a Court to hold that a child *en ventre sa mère* is deemed to be a child in being unless it is for the benefit of the child. If it is for the benefit of the child, the words "born in the lifetime of" or "alive at the death of" may be so construed that when the child is born the doctrine of relation back applies, and the child is treated as having been alive at the date when the gift comes into operation (*a*), and it is quite immaterial whether such child is the first life in being or not (*b*).

(*z*) 1 Bl. Com. 130.
(*a*) *Villar* v. *Gilbey*, [1907] A. C. 139; 76 L. J. Ch. 339.
(*b*) *Trower* v. *Butts*, 1 Sim. & St. 181; 1 L. J. (o.s.) 115, as explained in *Blasson* v. *Blasson*, 2 De J. & S. 665; 34 L. J. Ch. 18.

CHAPTER II.

ACTS AND CONTRACTS OF INFANTS.

Infancy Personal Disability Only.—Infancy is a personal privilege, and is used for the purpose of protecting the minor, therefore the incidents arising out of infancy are peculiar to the infant, and cannot be taken advantage of except by the infant or his representatives; thus, if any person of full age enter into an agreement with an infant, he is bound thereby, despite the want of reciprocal responsibility, and it is only at the option of the infant or his representatives to avoid it (*a*); so, a third person not a party to the contract cannot take advantage of the infancy of one of the contracting parties to avoid it, unless it be void in its inception (*b*). An infant is not bound by recitals of a deed made during infancy (*c*), or by a proviso in a deed to which he was not a party, though taking benefits under it (*d*). This personal protection is to be used as a shield, and not as a sword; therefore, where the infant has been guilty of fraudulent misrepresentation as to his age, which has deceived the party dealing with him, relief may be obtained in equity in respect of his conduct.

The benefit of the infant is the only object which the law has in view: it therefore permits him to ratify or avoid certain contracts which may be beneficial to him, or declares void those which it deems to be prejudicial to him, and will even bind him in respect of those contracts which it is an advantage to him that he should be able to make, such as contracts for the necessaries of life.

Void and Valid Contracts.—There is a difficulty to be met with at the very threshold of the discussion of the acts and contracts of infants: that of classifying them. There has been much diversity of opinion both among judges and text-writers as to whether the acts and contracts of infants should be classified

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(*a*) *Coan* v. *Bowles*, 1 Show. 171.
(*b*) *Keane* v. *Boycott*, 2 H. Bl. 511.
(*c*) Per Eldon, C., in *Milner* v. *Lord Harewood*, 18 Ves. 259, 274.
(*d*) *Capes* v. *Hutton*, 2 Russ. 357.

at common law as *void*, *voidable*, and *valid*, or as *void* and *valid*. The modern tendency, as evidenced by judicial decisions and the opinions of text-writers, is to regard them as *void* or *valid* only; and this seems to be the more accurate opinion.

There is no doubt that much difficulty and apparent inconsistency has arisen from the loose way in which the word "void" has been used both by the judges and text-writers (*e*); it has been used in a sense equivalent to "voidable," or under circumstances which show that the judicial decision went no farther than to declare that the contract in question could not be enforced against the infant.

There is a wide distinction between an act or contract which is void and one that is voidable. That which is *void* is incapable of being enforced or ratified; it is of no effect from the moment of its inception, not only as regards the infant, but also the adult contracting party; in short, it is a nullity: that which is *voidable* is perfectly valid until set aside by the person who has the right or option to set it aside. Bingham (*f*) thus distinguishes between void and voidable: "Acts which are capable of being legally ratified are *voidable* only; acts which are incapable of being legally ratified are *void*." This distinction does not really remove the difficulty, for the question still remains, what contracts are void and what are voidable. Eyre, C.J. (*g*), thus states the matter: "The conclusion is, that for those things which the Court can pronounce to be necessary for the infant, he may bind himself even by deed. . . . We have seen that some contracts of infants even by deed shall bind them. Some are merely void, viz., such as the Court can pronounce to be to their prejudice. Others, and the most numerous class, of a more uncertain nature as to benefit or prejudice, are voidable only, and it is in the election of the infant to affirm them or not." This, in truth, does not accurately express the distinction required, for bearing in mind that "void" means that which is null and of no effect as regards both parties, a contract which might *prima facie* appear to the prejudice of the infant might really be to his advantage, and consequently it would be open to the adult contracting party at any time after its inception to treat it as of no effect, and the infant never could enforce it,

(*e*) Sir F. Pollock (Contracts, 53) has pointed out that even in Acts of Parliament it has been used as a term convertible with "voidable." See *Magdalen Hospital* v. *Knotts*, 4 App. Cas. 324; 48 L. J. Ch. 579.

(*f*) Inf. 234.

(*g*) In *Keane* v. *Boycott*, 2 H. Bl. 511, 514.

though on attaining majority he might have found it worth his while to treat it as a valid subsisting contract. This dictum of Chief Justice Eyre, moreover, fails to express the true state of the law; for, as there was no impediment in the way of an infant (at any rate until quite recently) ratifying on attaining majority a contract which was clearly to his prejudice, and which when ratified was binding on him, it therefore follows that contracts were not rendered *void* merely by reason of their being prejudicial to the interests of infants. That which was capable of being legally ratified must have had some legal existence; if it had not, the ratification would have been ineffectual. The true solution of the difficulty is, that the word *void* must be taken to mean in many cases no more than "*not enforceable against the infant.*" If this were not so, a contract of service clearly to the infant's detriment, as imposing harsh terms on him, would entitle the master of the infant servant to determine at any time their engagement, and to refuse to pay any wages for the services already rendered (*h*); and this would be more to the infant's harm than to hold it a valid contract, yet one which the infant might determine at his option. In dealing with the contracts of an infant the convenient course of dividing them into void and valid contracts will be followed.

Acts of Infants.—Certain acts of an infant were void or valid according as they were carried out with due and proper solemnity, or were wanting in such solemnity. Perkins (*i*) lays it down that "all such gifts, grants, deeds made by an infant as do not take effect by delivery of his hand are void; but all gifts, grants, or deeds made by an infant by matter in deed or writing, which take effect by delivery of his own hand, are voidable by himself, his heirs, and those who have his estate." In *Zouch* v. *Parsons* (*k*) the foregoing rule was approved, and in effect it was held that where the delivery of the infant's deed amounted to the livery of seisin, and operated as the conveyance of an interest, it was merely voidable, but when it did not take effect as an assurance by delivery of the hand, but required an additional ceremony, as in a power of attorney, it was then actually void. Comyns (*l*) considers it possible to gather from this case that "the true ground why an infant's deed is only voidable, is the

(*h*) See *Reg.* v. *Lord*, 17 L. J. M. C. 181; but compare it with *Leslie* v. *Fitzpatrick*, 3 Q. B. D. 229; 47 L. J. M. C. 22.
(*i*) Sect. 12.
(*k*) 3 Burr. 1794.
(*l*) Dig. Enf. C. 3.

solemnity of the delivery." But Lord Mansfield, who delivered the judgment of the Court, added (*m*): "But be the point upon the *solemnity of the delivery* as it may (for there are respectable sayings the other way), it is not necessary to our determination. For we are all of opinion that the £109 received, and the other circumstances of the transaction, show a semblance of benefit sufficient to make it *voidable* only, upon the matter of the conveyance." This case was approved by Lord Eldon (*n*), and Lord St. Leonards (*o*), who upheld as sound law that a deed which takes effect by delivery, and is executed by an infant, is voidable only; but he added (*p*): "If I am to put my decision on the ground of the benefit arising to the infant from the deed, there is not only such a semblance of benefit, but so much real benefit conferred upon the infant as to bring the case within the branch of the rule laid down by Lord Mansfield in *Zouch* v. *Parsons*" (*q*). It is true that Comyns says (*r*), "Generally, every deed by an infant, as a grant of rent-charge, annuity, &c., is void"; but his authorities, Perkins (*s*) and *Thompson* v. *Leach* (*t*), do not support his statement, for Perkins himself lays it down that "a grantor cannot against such a deed in pleading say that he did not grant by the deed, for the deed was not void, but voidable" (*u*); and the case of *Thompson* v. *Leach*, above cited, was that of a person *non compos*, therefore observations in it as to infants' deeds were mere *obiter dicta*.

But Coke himself has it (*x*) that an infant may make a purchase of land which is voidable only, for "it is intended for his benefit, and at his full age he may either agree thereunto and perfect it, or, without any cause to be alleged, waive or disagree to the purchase." It has been laid down that "all instruments and acts of an infant are voidable only, except those which are necessarily to his prejudice, these last being void" (*y*). Those acts and deeds which are either by rule of law ineffectual, or can be pronounced by the Court to be to the manifest prejudice

(*m*) P. 1808.
(*n*) In —— v. *Handcock*, 17 Ves. 383.
(*o*) *Allen* v. *Allen*, 2 Dr. & W. 307
(*p*) P. 341.
(*q*) *Ubi sup.*
(*r*) Dig. Enf. C. 2.
(*s*) Sect. 13.
(*t*) 3 Mod. 310.
(*u*) By the rules of pleading, the plea to a *void* deed was *non est factum;* but this was not a plea under which an infant could give evidence of his infancy; but it must have been pleaded specially. *Whelpdale's Case*, 5 Rep. 119; *Zouch* v. *Parsons* (*ubi sup.*).
(*x*) Litt. 2 b.
(*y*) Simp. Inf. p. 9.

of the infant are void, and to be set aside by him or his representatives. A joint and several bond or covenant by an adult and an infant is not void by reason of the joinder of the infant (*z*). There seems to be some doubt where the covenant or bond is joint only (*a*), but there does not seem to be any real reason why it should be held void as against the adult.

Void Acts.—Acts of an infant which are void include a conveyance of property to his guardian (*b*); a release of his trustee who has handed over only a part of the trust funds (*c*); an appointment of an agent (*d*) (a lease by an agent so appointed is void), and the infant may bring an action of ejectment without any notice to quit (*e*), and an appointment or warrant of attorney. But to this latter an exception is made by the Law of Property Act, 1925 (*f*), in the case of married women. The Act provides that a married woman, *whether an infant or not*, has power, as if she were unmarried and of full age, by deed, to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do; and the provisions of this Act relating to instruments creating powers of attorney shall apply thereto. This section applies only to deeds executed after December 31, 1881. A will (*g*), except as a soldier in actual military service, an airman, or a seaman at sea (*h*). A breach of trust, whether authorized (*i*) or adopted (*k*). Submission to a reference by attorney (*l*), or his cognovit (*m*); a bond with a penalty and for payment of interest, though it has been given for necessaries; such a bond is held void, as it is clearly not for the infant's benefit (*n*). An infant cannot give a valid receipt (*o*), unless

(*z*) *Gillow* v. *Lillie*, 4 L. J. C. P. 222.
(*a*) See *Gillow* v. *Lillie* (*ubi sup.*).
(*b*) Bac. Abr. Inf. 1, 3; 1 Roll. Abr. 728.
(*c*) *Overton* v. *Bannister*, 3 Ha. 503.
(*d*) *Doe* v. *Roberts*, 16 M. & W. 778.
(*e*) *Ibid.*
(*f*) 15 Geo. V. c. 20, s. 129.
(*g*) 1 Vict. c. 26, s. 7. See p. 754.
(*h*) *Ibid.* s. 11. See *In the goods of Hiscock*, [1901] P. 78; 70 L. J. P. 22, and *Gattward* v. *Knee*, [1902] P. 99; 71 L. J. P. 34.
(*i*) *Wilkinson* v. *Parry*, 4 Russ. 272.
(*k*) *Zambaco* v. *Cassavetti*, L. R. 11 Eq. 439.
(*l*) *Biddle* v. *Dowse*, 6 B. & C. 255.
(*m*) *Oliver* v. *Woodroffe*, 4 M. & W. 650. In this case Lord Abinger said: "The general principle of law is that a minor is not to be allowed to do anything to prejudice himself or his rights."
(*n*) *Baylis* v. *Dineley*, 3 M. & S. 477; *Ex parte The Unity Joint-Stock Mutual Banking Association, Re King*, 27 L. J. Bk. 33.
(*o*) See *Stott* v. *Meanock*, 31 L. J. Ch. 746. For the payment of small sums into a post-office savings bank to the credit of an infant, see *Elliott* v. *Elliott*, 54 L. J. Ch. 1142.

the instrument of donation specially provides that his receipt shall be a discharge (*p*). But an infant, who is also a married woman, may, by the provisions of the Law of Property Act, 1925 (*q*), give a valid receipt to her trustees for all income paid to her by them, including statutory accumulations of income made during minority to which she may be entitled. A bond executed by an infant as a surety has been held void in America (*r*). An account stated, even for necessaries; this was formerly a voidable act on the part of the infant (*s*), but by the Infants' Relief Act, 1874 (*t*), it is expressly rendered absolutely void. A bill of exchange, whether drawn or accepted, or endorsed by an infant, or a promissory note made by him, is void under the Act of 1874 (*u*). The Bills of Exchange Act, 1882 (*x*), says that capacity to incur liability as a party to a bill is co-extensive with capacity to contract, and this has been held to mean that he is not liable on a bill even for necessaries though he may be liable on the consideration (*y*). Previously to the Act of 1874 its acceptance might have been ratified on his attaining majority, but now ratification after attaining majority accepted before majority does not make him liable on a bill (*z*), or on a post-dated cheque (*a*), Where the acceptance of a bill takes place after attaining majority in respect of a debt contracted before majority he is liable if the bill is negotiated (*b*), but not to a holder with notice (*c*). It seems, however, that the infant may be bound in certain circumstances. In one case it was held that an infant who had obtained furniture on the representation that he was of full age and had sold the furniture was held to be liable on an equitable principle to make restitution by refunding the money (*d*). But in another case the Court of Appeal held that this principle, if it existed, certainly did not apply to money loans obtained by an infant, even though he misrepresented his age, that the cause of action was *ex contractu*, and was not sustainable (*e*). His mere trading as an adult is

(*p*) 4 Dav. Prec. 73.
(*q*) 15 Geo. V. c. 20, s. 21.
(*r*) Sch. Dom. Rel. s. 404, and the cases there cited.
(*s*) *Williams* v. *Moor*, 12 L. J. Ex. 253.
(*t*) 37 & 38 Vict. c. 62, s. 1.
(*u*) *Ex parte Kibble*, *Re Onslow*, L. R. 10 Ch. 373; 44 L. J. Bk. 63.
(*x*) Sect. 22.
(*y*) *Re Soltykoff*, *Ex parte Margrett*, [1891] 1 Q. B. 413; 60 L. J. Q. B. 339.
(*z*) *Ex parte Kibble*, (*ubi sup.*).
(*a*) *Hutley* v. *Peacock*, 30 T. L. R. 42.
(*b*) *Belfast Banking Co.* v. *Doherty*, 4 Ir. L. R. Q. B. D. 124.
(*c*) *Smith* v. *King*, [1892] 2 Q. B. 543.
(*d*) *Stocks* v. *Wilson*, [1913] 2 K. B. 235; 82 L. J. K. B. 598.
(*e*) *R. Leslie, Lim.* v. *Shiell*, [1914] 3 K. B. 607; 83 L. J. K. B. 1145.

insufficient to render him liable for trade debts (*f*). Though the infant is not bound, he may yet bring an action on a bill or note (*g*). In an action against the acceptor in which infancy is the defence, the acceptor is bound to prove that he accepted the bill when an infant (*h*). An acceptance is binding if given when the acceptor was an adult, though the bill was drawn while he was an infant (*i*). An infant's void deeds or conveyances may be set aside during his minority, and it is not necessary to wait till he has attained his majority to treat them as null and void.

Valid Acts.—All acts and instruments of a solemn nature which are not to an infant's prejudice are valid and binding until set aside by him on attaining majority. The term valid includes voidable, for an infant may avoid all acts done by him during infancy, except such as are binding on him by legislative sanction, or by order of a Court of competent jurisdiction. It has been seen that the true test of the validity of an infant's deed is the advantage or absence of prejudice to be derived from it, and that though valid, it is yet voidable at his option on attaining majority; but those persons affected by his acts have not the same privilege. The arrangement here followed will be to set out first, those acts which are voidable at the infant's election, next, those which are absolutely binding on him.

Voidable Acts.—The deeds of infants are, as a rule, voidable (*k*); so, too, grants, whether of corporeal or incorporeal hereditaments, and assignments. Thus, his feoffment is voidable (*l*), or his surrender in ordinary cases (*m*); or his grant of a rent-charge (*n*). But a free and voluntary gift by him of personal chattels would seem to be good and effectual (*o*); so, too, the engrafting of a trust upon the legal estate by him, though any equitable interest would not be allowed to be enforced against him; and if he died without having avoided the trust, a Court of equity would still investigate the transaction and see that no unfair advantage had been taken of him (*p*).

(*f*) *Miller* v. *Blankley*, 38 L. T. 527; *Ex parte Jones*, *Re Jones*, 18 Ch. D. 109; 30 L. J. Ch. 673.
(*g*) *Halliday* v. *Atkinson*, 5 B. & C. 501.
(*h*) *Roberts* v. *Bethell*, 22 L. J. C. P. 69.
(*i*) *Ibid.*; *Stevens* v. *Jackson*, 4 Camp. 164.
(*k*) *Martin* v. *Gale*, 4 Ch. D. 428; 46 L. J. Ch. 84.
(*l*) *Whittingham's Case*, 8 Rep. 43; Co. Litt. 337 b.
(*m*) *Zouch* v. *Parsons*, 3 Burr. 1794.
(*n*) See *Hudson* v. *Jones*, 3 Mod. 311 n.
(*o*) See *Taylor* v. *Johnston*, 19 Ch. D. 603; 51 L. J. Ch. 879.
(*p*) See Lewin, p. 24.

In connection with such matters however it must be remembered that the appointment now of an infant as trustee is void (*q*), and that under the Settled Land Act, 1925, the effect of conveying a legal estate to an infant is that the conveyance operates merely as an agreement for valuable consideration to execute a settlement by means of a vesting deed and trust instrument in favour of the infant, and in the meantime to hold the land in trust for the infant (*r*). The powers conferred by the Settled Estates Act, 1877, are not affected, provided a legal estate in land is not vested in the infant (*s*).

Binding Acts.—There are certain acts which when done by an infant not only are valid, but are binding upon him. The acts of an infant which do not touch his material interests, but take effect from the authority which he is trusted to exercise, are binding (*t*); thus, an infant officer may perform the duty of the office which he may hold, as where an infant patron presents (*u*) or nominates (*x*) to a benefice; and no public inconvenience can arise from his presentation or nomination, since the bishop is to judge of the qualification of the clerk presented. "In all cases infants present to livings; that is the common custom of the realm, which is the common law. It is not said in any case that the infant shall be of the age of discretion. In such cases the guardian must present in the name of the infant, or the infant by the consent of his guardian; and so are all infants' affairs transacted. . . . The guardian ought to put the infant's hand to the nomination and not a stranger" (*y*).

That which an infant is bound to do he can validly do. In the case of *Zouch* v. *Parsons* (*z*) the question arose whether a lease and release executed by an infant was binding on him. Lord Mansfield held under the circumstances of that case that it was, because, among other reasons, as the infant had only done what the Court of Chancery would have compelled him to do, his conveyance was actually binding on him. If an infant purchase an estate, he can repudiate his bargain. He

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(*q*) Law of Property Act, 1925, s. 20.
(*r*) Sect. 27 (1).
(*s*) Sect. 27 (3).
(*t*) See Lewin, p. 37.
(*u*) Co. Litt. 246 a; *Hearle* v. *Greenbank*, 3 Atk. 695, 710.
(*x*) *Arthington* v. *Calverley*, 2 Eq. Cas. Ab. 518; 8 Osborn MSS. 174.
(*y*) Per Lord Chancellor King in *Arthington* v. *Calverley* (*ubi sup.*), and see *Leigh* v. *Leigh*, [1902] 1 Ch. 400; 71 L. J. Ch. 195.
(*z*) *Ubi sup.*

may take or accept by will, purchase, or surrender, but he is not bound to take property if it would be to his disadvantage. An infant may accept a grant, but he can avoid it at majority (*a*). An infant by custom may make a feoffment of his gavelkind land at the age of fifteen (*b*). If he take an estate he is liable to pay the rent and perform the services, but he is not liable to pay more than he actually receives as profits from the estate (*c*). He is liable for a customary fine of copyhold if he occupy (*d*), for assessment of county rates, &c. (*e*), or any obligation imposed by tenure, as the repair of a bridge, if he be in actual receipt of the rent and profits (*f*). An infant takes subject to any contract by the person through whom he claims respecting the estate, as mortgage, contract for sale (*g*), or lease (*h*); and he is bound by a trust for the conversion of the property, real or personal, that he takes, though absolutely entitled to it (*i*).

Infant Bound by Conditions Annexed to Property.—An infant is bound by certain conditions imposed upon him; thus, if he take an estate he is bound by any condition annexed to it, and if he cannot perform the condition, he cannot take the estate (*k*), as where he takes an estate upon condition of paying a sum of money which he is unable to pay (*l*); but where the condition is to pay out of rents and profits, and by reason of infancy he is not in possession of rents and profits, the condition will not bind him till he comes into possession (*m*). But he is not bound by a condition on taking an estate which involves a course of conduct on his part which may be overruled by those who have a legal right to prescribe for him a particular course of conduct; thus, where he is devisee of an estate, the interest in which is to cease if the devisee refuses or neglects to reside in the mansion-house, he is not bound by the condition, and so, if he does not reside in the mansion-house, he cannot be said to refuse or neglect so to do (*n*). He

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(*a*) Co. Litt. 2 b, 350 b; Bac. Abr. Inf. (*b*) 2 Dav. Conv. 221.
(*c*) *Re Fair*, 13 Ir. Rep. Eq. 278.
(*d*) *Evelyn* v. *Chichester*, 3 Burr. 1717. In this case he had occupied for two years after attaining majority. See pp. 768, 769.
(*e*) 2 Inst. 703.
(*f*) *Rex* v. *Sutton*, 3 Ad. & El. 597; 4 L. J. K. B. 215.
(*g*) *Bullock* v. *Bullock*, 1 J. & W. 603.
(*h*) *Maddon* v. *White*, 2 T. R. 159.
(*i*) *Van* v. *Barnett*, 19 Ves. 102.
(*k*) *Cary* v. *Cary*, 2 Sch. & Lef. 173.
(*l*) *Gundry* v. *Baynard*, 2 Vern. 278.
(*m*) *Slade* v. *Tomson*, 3 Bulst. 58.
(*n*) *Partridge* v. *Partridge*, [1894] 1 Ch. 351; 63 L. J. Ch. 122.

is likewise bound by a condition to marry or not to marry a particular person (*o*), though he be unaware of the condition on taking the property (*p*). Bonds given by infants under the Customs Act are valid (*q*).

Doctrine of Election.—The doctrine of election applies to infants as well as to adults, and an infant will be compelled to elect whether to take under or against an instrument, and it is applicable alike to real (*r*) and personal estate (*s*). But if the Court sanction it, he may be allowed to take in its unconverted state property which is directed to be converted (*t*). The Court as a rule will direct an inquiry as to how the infant's election should be made (*u*).

Compromise.—The Court has power to compromise the rights and claims of infants, where such are not only equitable (*x*), but also legal (*y*). A compromise assented to by the infant's counsel is not binding unless sanctioned by the Court (*z*); but the Court itself has no power to force a compromise on the infant's next friend (*a*). If a compromise has been brought about by any suppression or misrepresenta- of facts, or fraud, it will be set aside (*b*); and if the compromise is only for the benefit of the next friend, it will not be allowed to stand (*c*).

Judgments and Decrees against Infants.—A judgment in law is binding on an infant until he has it set aside by showing that he was an infant when it was obtained (*d*); the Court, however, can inquire into its consideration, and if it is found to be within the mischief of the Infants' Relief Act, 1874, it can be set aside (*e*); but a judgment obtained in an action by the infant's next friend is binding on him, though he has never consented to the action being brought (*f*). But he is

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(*o*) *Cary* v. *Bertie*, 2 Vern. 333.
(*p*) *Gardiner* v. *Slater*, 25 Beav. 509.
(*q*) 39 & 40 Vict. c. 36, s. 165.
(*r*) *Streatfield* v. *Streatfield*, Cas. t. Talb. 176.
(*s*) *Hervey* v. *Desbouverie*, *ibid.* 130.
(*t*) *Robinson* v. *Robinson*, 19 Beav. 494.
(*u*) *Bennett* v. *Houldsworth*, 6 Ch. D. 671; 46 L. J. Ch. 646.
(*x*) *Brooke* v. *Lord Mostyn*, 2 De G. J. & S. 373.
(*y*) *Doe* d, *Miller* v. *Noden*, 2 Esp. 530.
(*z*) *Hargrave* v. *Hargrave*, 19 L. J. Ch. 261.
(*a*) *Re Birchall*, *Wilson* v. *Birchall*, 16 Ch. D. 41.
(*b*) *Brooke* v. *Lord Mostyn* (*ubi sup.*).
(*c*) *Rhodes* v. *Swithenbank*, 22 Q. B. D. 577; 58 L. J. Q. B. 287.
(*d*) *Henry* v. *Archibald*, 5 Ir. Rep. Eq. 559; *Cooper* v. *Cooper*, L. R. 7 H. L. C. 53; 39 L. J. Ch. 240.
(*e*) *Re Onslow's Trusts*, L. R. 20 Eq. 677; 44 L. J. Ch. 628.
(*f*) *Morgan* v. *Thorne*, 7 M. & W. 400.

not to suffer by negligence or want of knowledge on the part of his next friend, and may impeach a decree or judgment founded on error in the facts, without being required to produce the usual evidence that the facts relied on were not known and could not have been discovered with reasonable diligence (*g*). A decree or order in equity in his own suit is binding, unless fraud (*h*), gross negligence (*i*), error (*k*), or new matter is shown (*l*), and he must apply within a reasonable time after attaining twenty-one to set it aside (*m*). A judgment against his real estate for necessaries would, it seems, bind the inheritance (*n*). If an infant were bound over to prosecute and failed to do so, in all probability the Court would order a forfeiture of his recognizances (*o*). The Court as a rule makes an inquiry whether an order will be beneficial for an infant; but if an order is made without that preliminary inquiry, it will be treated as of the same authority as if the inquiry had been made (*p*).

Vesting Orders.—Under certain statutes the interests of infants are bound when it is to their advantage, or the necessities of the case require that they should be. The infant is, of course, legally incapable of making a binding sale or disposition of his property, and the Court of Chancery has no intrinsic power or jurisdiction to do that for the infant which the law has declared him incapable of doing (*q*). It required the intervention of the Legislature to confer upon the Court those powers, and within those alone could it act.

Thus, under the Trustee Act, 1850 (*r*), where an infant was seised or possessed by way of mortgage or trust of any lands, the Court might make a vesting order of such lands; and the order had the same effect as if the infant trustee or mortgagee had been of age, and had duly executed a conveyance or assignment of the lands (*s*); or where an infant was entitled to

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(*g*) *Re Hoghton*, L. R. 18 Eq. 573.
(*h*) *Colcough* v. *Bolger*, 4 Dow, 54.
(*i*) *Re Hoghton* (*ubi sup.*).
(*k*) See *Hindmarsh* v. *Southgate*, 3 Russ. 324.
(*l*) See *Carew* v. *Johnston*, 2 Sch. & Lef. 280.
(*m*) *Sheffield* v. *Duchess of Buckingham*, 1 Atk. 629, 631; *Gregory* v. *Molesworth*, 3 Atk. 626; *Re Hoghton* (*ubi sup.*). See *Moneypenny* v. *Dering*, 33 L. T. (o.s.) 159.
(*n*) Per James, L.J., in *Re Howarth*, L. R. 8 Ch. App. 418; 42 L. J. Ch. 316.
(*o*) See *Ex parte Williams*, 13 Price, 673.
(*p*) *Brooke* v. *Lord Mostyn* (*ubi sup.*).
(*q*) *Calvert* v. *Godfrey*, 6 Beav. 97; *Field* v. *Moore*, 25 L. J. Ch. 66. See *ante*, p. 694.
(*r*) 13 & 14 Vict. c. 60.
(*s*) Sect. 7, repealed by 56 & 57 Vict. c. 53, s. 51, in its turn repealed by the Trustee Act, 1925.

any contingent right in any lands upon trust or by way of mortgage, the Court might make an order releasing the lands from such contingent right (*t*); and a like vesting order was made in the case of infants possessed of stock upon trust (*u*). Again, under 15 & 16 Vict. c. 86, where an infant held lands subject to the debts of his ancestor or testator, the Court would enable him to convey the lands for the purposes of sale, and the Court would direct a sale rather than a foreclosure where it was clearly for the infant's benefit (*x*). Under the new provisions of the legislation of 1925 which prevent land vesting in an infant, and which provide that the personal representatives shall have power to appoint trustees for the infant who can exercise all the powers of a tenant for life under the Settled Land Act, 1925, the old procedure which gave the infant the right of demurring against decrees of the Court within six months after attaining majority, may be taken to be done away with.

Under the Lands Clauses Act, 1845 (*y*), an infant may be bound by a conveyance of his land to a railway company, or other public undertaking (*z*).

By the Infants' Settlement Act, 1855 (*a*), an infant may with the sanction of the Court make a valid and binding settlement of his or her real or personal estate in contemplation of marriage (*b*); and infants by their trustees are enabled by statute to sell and convey land for purposes connected with religion, charity, instruction, literature, science, and the fine arts, or works of a public nature (*c*).

Powers.—An infant in exercising a general power of appointment for the purpose of making a settlement is enabled by the Infants' Settlement Act, 1855 (*d*), to make an absolute appointment, so that on failure of the limitations of the settlement, the appointed property will become his own whether he dies under age or not (*e*). An infant may exercise a power which is only collateral over real and personal estate;

(*t*) Sect. 55, repealed with sect. 7
(*u*) 15 & 16 Vict. c. 55, s. 3.
(*x*) Sect. 55.
(*y*) 8 & 9 Vict. c. 18, s. 17.
(*z*) Dan. Ch. Pr. 179.
(*a*) 18 & 19 Vict. c. 43.
(*b*) See *post*, chap. iv., Marriage Settlements of Infants.
(*c*) Settled Land Act, 1925, s. 55.
(*d*) 18 & 19 Vict. c. 43.
(*e*) *Re Scott, Scott* v. *Hanbury*, [1891] 1 Ch. 298; 60 L. J. Ch. 461; and see *Re D'Angibau, Andrews* v. *Andrews*, 15 Ch. D. 228; 49 L. J. Ch. 756.

a power in gross (that is, where coupled with an interest affected by it) over personal but not real property (*f*), if there is an intention that it should be exercisable during minority; but he cannot exercise at all a power appendant or appurtenant (*g*).

Contracts of Infants.

Classification.—The division or classification of contracts will be the same as that of the acts of infants, that is, into (1) Void, and (2) Valid. If those cases are put aside in which the term "void" is clearly used as convertible with and equivalent to "voidable," there is much authority for saying that formerly very few contracts entered into by infants were void, but rather the majority of them were voidable at his option. "The promise of an infant is, generally speaking, absolutely *void as against himself*" (*h*); for instance, his executory promise can be rescinded by him at any time before it is completed; but the mere fact that a contract cannot be for his benefit does not render it *absolutely void*. The Court of Exchequer Chamber, in *Warwick* v. *Bruce* (*i*), held that "the general law is that the contract of an infant may be avoided or not at his own option," and Parke, B., delivering the judgment of the Court of Exchequer in *Williams* v. *Moor* (*k*), said: "The argument on behalf of the defendant was, that an account stated by an infant is not merely voidable, but actually void, so that no subsequent ratification can make it of any avail. But we can see no sound or sensible distinction in this respect between the liability of an infant on an account stated, and his liability for goods sold and delivered, or on any other contract." His lordship thus concluded: "The general doctrine is, that a party may, after he attains the age of twenty-one years, ratify and so make himself liable on contracts made during infancy. We think that, on principle unopposed by authority, this may be done on a contract arising on an account stated, as well as on any other contract." It has been laid down that an infant can do no act to bind himself unless it be manifestly for his benefit (*l*); but the other opinion,

(*f*) *Re Cardross' Settlement*, 7 Ch. D. 728; 47 L. J. Ch. 327.
(*g*) 6 Byth. & Jar. 154.
(*h*) Macph. Inf. 477. Here "void" is convertible with "voidable."
(*i*) 6 Taunt. 118. In Cam. Scac. *Bruce* v. *Warwick*.
(*k*) 12 L. J. Ex. 253.
(*l*) Per Abbott, C.J., in *Rex* v. *Wigston*, 3 B. & C. 484.

and one followed in more recent decisions, is that the Court must be satisfied that the contract is not for his advantage before it can be held void (*m*).

Power to Enforce Contracts.—Valid contracts between infants and adults bind the latter, but the former have the privilege of avoiding or confirming them at majority; for "those who enter into contracts with them shall be bound, if it be prejudicial to the infant to rescind the contract" (*n*). This is a valuable privilege; and to declare their contracts void which may have a superficial aspect of prejudice to them would be to deprive them of this privilege, and be more to the adult's advantage than theirs. The object of the law, which is the protection of the infant, is amply secured by not allowing the contract to be enforced against him during his infancy, and leaving it in his option to affirm or repudiate it at his full age. An infant may enforce his contracts by suit against the adult contracting party, though he himself has incurred no corresponding obligation. Thus, an infant may sue for wages on a contract for hiring and service (*o*); for a breach of contract to marry (*p*), and generally for breach of any contract entered into with him (*q*). But there is an exception to his power of enforcing his voidable contracts against the other contracting party during infancy, for specific performance will not be granted at the suit of an infant, because the remedy is not mutual (*r*). The infant, on the contrary, is not liable for goods supplied him (*s*), or for work and labour done at his request (*t*), or for rent in an action for use and occupation of premises occupied by him (*u*), or for breach of contract to marry (*x*), or on a warranty (*y*). Nor

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(*m*) Per Martin, B., in *Cooper* v. *Simmons*, 31 L. J. M. C. 138. See *Meakin* v. *Morris*, 12 Q. B. D. 354; 53 L. J. M. C. 72.

(*n*) Per Lord Redesdale in *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 58.

(*o*) Per Bayley, J., in *Rex* v. *Chillesford*, 4 B. & C. 101.

(*p*) *Holt* v. *Ward Clarencieux*, 2 Stra. 937.

(*q*) *Warwick* v. *Bruce*, 6 Taunt. 118.

(*r*) *Flight* v. *Bolland*, 4 Russ. 298. See *Lumley* v. *Ravenscroft*, [1895] 1 Q. B. 683; 64 L. J. Q. B. 441.

(*s*) *Stone* v. *Withypol*, Cro. Eliz. 127; 37 & 38 Vict. c. 62, s. 1. His liability or non-liability for goods sold to him is determined at the time the property in the goods passed to him; thus where goods are bought by an infant, and delivered to his carrier (the property in them thereby passing) but not delivered by the carrier till after he has attained twenty-one, he is not liable. *Griffin* v. *Langfield*, 3 Camp. 254.

(*t*) *Dilk* v. *Keighley*, 2 Esp. 480. (*u*) *Lowe* v. *Griffith*, 1 Scott, 458.

(*x*) *Coxhead* v. *Mullis*, 3 C. P. D. 439; 47 L. J. C. P. 761; *Northcote* v. *Doughty*, 4 C. P. D. 385; *Ditcham* v. *Worrall*, 5 C. P. D. 410; 49 L. J. C. P. 688.

(*y*) *Howlett* v. *Haswell*, 4 Camp. 118.

would he be prejudiced by leaving his goods in the order and disposition of one who becomes bankrupt (*z*).

When Infant Bound: Fraud.—An infant, however, is not entitled to commit fraud with impunity; consequently, if he represent himself to be of full age, he is bound by payments made and acts done at his request and on the faith of such representations and is liable to restore any advantage he has obtained by such representations to the person from whom he has obtained it (*a*). Where an infant obtained furniture on a fraudulent misrepresentation of his age, it was held that the plaintiff was entitled by way of equitable relief to an order that the infant should account to her for a sum of £30 he had obtained by the sale of part of the goods and a sum of £100 he had raised upon the goods by means of a bill of sale (*b*). But where an infant borrowed money upon a similar misrepresentation it was held that ordering repayment would be to give effect to a contract which was void, and the defence of infancy succeeded, there being no equitable liability (*c*). But in the absence of any false assertion by the infant, relief in equity will not be granted against him upon the ground that the other contracting party believed him to be of full age (*d*); and the mere fact of his entering into a transaction, which must necessarily be invalid, unless entered into by an adult, is not such a fraud as entitles the other party to relief (*e*); and knowledge of his infancy by the other party is a complete bar to relief (*f*). The fraud, it would appear, must be active in its character, and the mere negation of the true state of facts would be insufficient to bind him (*g*).

Void Contracts.—Certain contracts and agreements of infants were void. Thus a bare agreement to deliver goods was void (*h*). Contracts clearly to the prejudice of the infant were likewise void, as a release of debts by an infant executor (*i*). If he bind himself by a bond with a penalty to pay for things supplied him, whether necessaries or not, he is not bound (*k*). Again, there are some contracts which under

(*z*) *Viner* v. *Cadell*, 3 Esp. 88.
(*a*) See *Bartlett* v. *Wells*, 31 L. J. Q. B. 57; *Clarke* v. *Cobley*, 2 Cox, 173.
(*b*) *Stocks* v. *Wilson*, [1913] 2 K. B. 235; 82 L. J. K. B. 598.
(*c*) *R. Leslie, Lim.* v. *Shiell*, [1914] 3 K. B. 607; 83 L. J. K. B. 1145.
(*d*) *Stikeman* v. *Dawson*, 1 De G. & S. 90. (*e*) *Ibid.*
(*f*) *Nelson* v. *Stocker*, 32 L. T. (o.s.) 368.
(*g*) See Simp. Inf. 102.
(*h*) Perk. s. 12.
(*i*) *Russell's Case*, 5 Rep. 27.
(*k*) Co. Litt. 172 a.

one set of circumstances may be valid, and under another absolutely void. A contract made by an infant professional billiards player as to arrangements for an exhibition tour (*l*), and a contract for singing lessons and a commission to the teacher have been held binding (*m*), but a contract between an infant boxer and a manager and instructor, where every clause was for the benefit of the manager and there was no safeguard for the infant's protection, was held unenforceable (*n*). Formerly the presence or absence of prejudice (by which the validity or invalidity of the contract was determined) was decided by the tribunal before which the case came for decision; but by the Infants' Relief Act, 1874 (*o*), a large number of contracts entered into by infants are declared to be absolutely void, and it is immaterial whether or not they would be prejudicial to the infant. But though a contract may be declared void and set aside, yet if an infant has paid any money for things which he has used or consumed he cannot recover their price (*p*).

Infants' Relief Act, 1874.—The short but important provisions of this Act are as follows:—

Sect. 1. "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void; provided always that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable."

Arguing from the analogy supplied by Lord Tenterden's Act (*q*), it may be said that the effect of this section is to leave those contracts which are incident to interests in property of a permanent nature, with obligations attached to them (such as partnership, and the holding of shares), valid and subsisting until set aside by the infant on reaching twenty-one, or within a reasonable time after. Again, section 5 of Lord Tenterden's Act required that the confirmation of promises of infants reaching majority should be in writing. Notwithstanding this provision, contracts of partnership and the like entered into by

(*l*) *Roberts* v. *Gray*, [1913] 1 K. B. 520; 82 L. J. K. B. 362.
(*m*) *Mackinlay* v. *Bathurst*, 36 T. L. R. 31.
(*n*) *Shears* v. *Mendeloff*, 30 T. L. R. 342.
(*o*) 37 & 38 Vict. c. 62.
(*p*) *Valentini* v. *Canali*, 24 Q. B. D. 166; 59 L. J. Q. B. 74.
(*q*) 9 Geo. IV. c. 14.

infants were held valid and binding upon them if they did not disaffirm them, though they did not ratify them in writing according to the statute.

All contracts, whether by specialty or by simple contract, for the repayment of money lent, or to be lent, are void (*r*); all contracts for goods supplied or to be supplied (other than for necessaries) (*s*); trading contracts (*t*); all accounts stated with infants (*u*), even for necessaries (*x*); and they cannot be used as evidence against him that the goods supplied were necessaries (*y*).

Betting and Loans Infants Act, 1892.—If any infant, who has contracted a loan which is void in law, agrees after he comes of age to pay any money in respect of such loan, and any negotiable instrument is given in respect of such loan, such agreement and instrument except in so far as they relate to a new advance are absolutely void against all persons (*z*). A promise to marry is within the Act (*a*).

Proceedings in Bankruptcy.—An infant cannot be adjudicated a bankrupt (*b*). It has been seen that an infant cannot contract legal debts by way of trade or otherwise, except for necessaries; and if persons enter into business relations with him, they do so at their own risk, and can only rely on his honour and integrity to repay them for what they have furnished to him. An infant who trades does not hold himself out by such trading as an adult, so as to make himself able to contract valid debts, and liable to be made a bankrupt on his own petition (*c*), or on that of a creditor (*d*), nor does he bring himself within the bankruptcy jurisdiction by trading in partnership with others (*e*). For the like reason that he cannot validly contract, he is not liable to the criminal provisions of the Debtors Act, 1869 (*f*). Though if he fraudulently convert goods

(*r*) Infants' Relief Act, 1874, s. 1.
(*s*) *Ibid.*; *Ex parte Kibble, Re Onslow*, L. R. 10 Ch. App. 373; 44 L. J. Bk. 63.
(*t*) *Ex parte Jones, Re Jones*, 18 Ch. D. 109; 30 L. J. Ch. 673; *Reg.* v. *Wilson*, 5 Q. B. D. 28; 49 L. J. M. C. 13.
(*u*) Sect. 1.
(*x*) *Bartlett* v. *Emery*, 1 T. R. 42 n.
(*y*) *Ingledew* v. *Douglas*, 2 Stark. 36.
(*z*) 55 & 56 Vict. c. 4, s. 5.
(*a*) *Coxhead* v. *Mullis*, 3 C. P. D. 439; 47 L. J. C. P. 761; *Northcote* v. *Doughty*, 4 C. P. D. 385; *Ditcham* v. *Worrall*, 5 C. P. D. 410; 49 L. J. C. P. 688.
(*b*) *Ex parte Henderson*, 1 Ves. 163; *Lovell and Christmas* v. *Beauchamp*, [1894] A. C. 607; 63 L. J. Q. B. 802.
(*c*) *Ex parte Jones* (*ubi sup.*).
(*d*) *Ex parte Kibble, Re Onslow* (*ubi sup.*).
(*e*) *Lovell and Christmas* v. *Beauchamp* (*ubi sup.*).
(*f*) 32 & 33 Vict. c. 62, s. 11.

which have been delivered to him under an agreement for their hire, he can be convicted of larceny as a bailee of them (*g*).

There seems to be nothing to prevent an infant presenting a petition to adjudicate his debtor a bankrupt, nor does there appear to be any insuperable obstacle to his issuing a debtor's summons, and if the debtor is adjudicated a bankrupt in consequence, the adjudication will not be set aside (*h*). The proper person to prove for the infant's legal debts is his guardian (*i*).

Valid Contracts.—The valid contracts of infants will be divided into two classes—(1) those which are voidable, and so may be set aside by them; (2) those which are binding upon them and cannot be set aside. This classification, it is submitted, is still a possible one, notwithstanding the passing of the Infants' Relief Act, 1874 (*k*). It would be difficult to maintain with success that the contracts here described as voidable are not within the letter of the first section of that Act, or, if they are contracts which infants can practically affirm on reaching twenty-one, by not repudiating within a reasonable time, and by claiming benefits under them, to deny that such qualified ratification is a practical limitation of the effect of section 2 of the same statute (*l*). It will be noticed that the contracts here treated of as voidable are such as are connected not with mere debts, but with incidents in property of a permanent and continuing nature, as realty, or partnership, or the holding of shares, to which obligations are attached. If these engagements are to be considered, as has been suggested, as being other than pure contracts, then the reason for upholding them would be that the infant is a purchaser of an interest in property of a permanent nature with obligations attached to it, and he cannot renounce the liability unless he has renounced his interest (*m*). If he enters into a contract of a permanent or continuing nature which is not of itself prejudicial to him he must repudiate it within a reasonable time of reaching majority or he will be bound by its terms (*n*). Again, it is not illegal for an infant to enter into contracts, and some of his engagements are clearly binding on him; others, though not absolutely binding on him, ought

(*g*) *Reg.* v. *Macdonald*, 15 Q. B. D. 323.
(*h*) *Ex parte Brocklebank*, *Re Brocklebank*, 6 Ch. D. 358; 46 L. J. Bk. 113.
(*i*) *Ex parte Belton*, 1 Atk. 251.
(*k*) 37 & 38 Vict. c. 62.
(*l*) See *post*, chap. iii., Ratification and Avoidance of Acts and Contracts.
(*m*) *North-Western Railway Co.* v. *M'Michael*, 5 Ex. 114; 20 L. J. Ex. 97.
(*n*) *Edwards* v. *Carter*, [1893] A. C. 360; 63 L. J. Ch. 100.

from their nature and incidents to be deemed valid until set aside by him.

Voidable Contracts: or those Valid until Set Aside by the Infant. Leases.—A lease executed by an infant with a reservation of rent is voidable (*o*), and it is not necessary that the best rent possible should be reserved (*p*). An agreement for a lease cannot be enforced against him either by way of specific performance or injunction (*q*). The lessee cannot avoid the lease on account of the infancy of the lessor (*r*); nor can the lessor well avoid during his infancy, as by granting another lease of the same property to another person (*s*), but he must wait till he be of age (*t*); but his heir may avoid it if he die under age (*u*). The avoidance should be some act of notoriety, as ejectment, entry, or demand of possession (*x*); the ratification may be shown by some such act as acceptance of rent (*y*), or by a mortgage of the land to the lessee by a deed reciting the lease (*z*). But where a lease is binding upon an infant, *e.g.*, as a reversioner of an estate leased from year to year, he cannot determine the tenancy without giving due notice to quit (*a*); so, too, where he has recognized the lease by receiving rent (*b*). A parol lease is voidable only, and the infant may recover for use and occupation (*c*). A lease without a rent reserved is not void, if it be to the infant's advantage.

There is a dictum of Lord Mansfield that if an infant take an estate and is to pay rent for it, he shall not hold the estate, and defend himself against payment of the rent by pretence of infancy (*d*); but Sir G. Jessel, in *Lemprière* v. *Lange* (*e*), stated that this was not the law, and certainly since the Infants' Relief Act, 1874, it could not be held to be an accurate statement of it. But if he had to pay rent *ratione tenuræ*, or perform some condition, in all probability his superior landlord would be entitled to distrain for arrears of such rent (*f*); or he might

(*o*) Per Lord St. Leonards in *Allen* v. *Allen*, 2 Dr. & W. 307, 339.
(*p*) *Slator* v. *Brady*, 14 Ir. C. L. R. 61.
(*q*) *Lumley* v. *Ravenscroft*, [1895] 1 Q. B. 683; 64 L. J. Q. B. 441.
(*r*) *Zouch* v. *Parsons*, 3 Burr. 1794.
(*s*) *Slator* v. *Trimble*, 14 Ir. C. L. R. 342.
(*t*) *Ibid.*
(*u*) 4 Cruise, 74, s. 67.
(*x*) *Slator* v. *Trimble* (*ubi sup.*).
(*y*) *Ibid.*
(*z*) *Story* v. *Johnson*, 2 Y. & C. Ex. 586.
(*a*) *Maddon* v. *White*, 2 T. R. 159.
(*b*) See *Rees* d. *Lloyd* v. *Evans*, cited Simp. Inf. 26.
(*c*) *Smith* v. *Bowen*, 1 Mod. 25.
(*d*) In *Earl of Buckinghamshire* v. *Drury*, 2 Ed. 60, 72.
(*e*) 12 Ch. D. 675.
(*f*) See Simp. Inf. 26. *Evelyn* v. *Chichester*, 3 Burr. 1717; *Rex* v. *Sutton*, 4 L. J. K. B. 215.

forfeit his interest in the land through non-performance of the condition. While a lease to an infant is voidable by him, if he continue to occupy after attaining twenty-one, he will be liable for all arrears of rent (*g*). The interests of the infant are regarded; therefore, where a lease is renewed to an adult alone in which the adult and infant are jointly interested, if beneficial, the adult will be held as trustee for the infant; if not, the renewal will be to the adult alone (*h*). An infant has been held liable for rent which became due while he was in occupation, though he repudiated the tenancy before attaining twenty-one (*i*). This liability does not rest on contract; and an action for use and occupation cannot be maintained against him, except in so far as the occupation may be considered *necessary*, and for his benefit (*k*), even where he has been guilty of fraudulent misrepresentation as to his age; but the Court may declare the lease under such circumstances to be null and void (*l*).

The election to avoid a lease must be made by the infant within a reasonable time after he attains majority (*m*); and an acquiescence of four months after majority has been held to preclude an infant from afterwards disaffirming a lease; and an acquiescence for so long a period would be evidence from which a jury might infer an affirmance of the lease (*n*). An infant's voidable conveyance of land cannot be avoided or confirmed during minority, not only because of the solemnity of the instrument, but "that his election might not be found by the judgment," that is, in any action brought during infancy to avoid his act (*o*). The powers of guardians to make leases have been dealt with earlier (*p*).

The surrender of a lease by an infant is voidable by him (*q*).

Mortgages.—An infant cannot execute a valid mortgage of his personal chattels, as by a bill of sale, nor under ordinary

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(*g*) *Ketsey's Case*, Cro. Jac. 320; S. C. *Ketley's Case*, 1 Brownl. 120; S. C. *Kettle* v. *Elliott*, 1 Roll. Abr. 731; and *Kirton* v. *Elliott*, 2 Bulst. 69.

(*h*) *Ex parte Grace*, 1 B. & P. 376. But see *Re Biss*, *Biss* v. *Biss*, [1903] 2 Ch. 40; 72 L. J. Ch. 473.

(*i*) *Blake* v. *Concannon*, 1 Ir. C. L. 323; but see *Lemprière* v. *Lange*, 12 Ch. D. 675.

(*k*) Simp. Inf. 26. See *Holmes* v. *Blogg*, 8 Taunt. 508.

(*l*) *Lemprière* v. *Lange* (*ubi sup.*).

(*m*) See *North-Western Railway Co.* v. *M'Michael*, 20 L. J. Ex. 97.

(*n*) *Slator* v. *Trimble*, 14 Ir. C. L. R. 342.

(*o*) *Zouch* v. *Parsons*, 3 Burr. 1794.

(*p*) Part II. chap. vi. pp. 701 *et seq.*

(*q*) See *Zouch* v. *Parsons* (*ubi sup.*).

circumstances of his realty (*r*), and though in the latter case his conveyance taking effect by delivery would be within the rule laid down by Perkins, and so good, yet the deed would be void as being clearly prejudicial to him, for it cannot be to his advantage to charge his property. The power of mortgaging settled land under the Settled Land Act, 1925, is exercisable by the tenant for life, and in the case of an infant by the personal representatives or trustees appointed under the settlement or by the personal representatives (*s*). Neither a guardian nor the Court of Chancery has any inherent power to mortgage an infant's property, except that the latter may direct a mortgage of the infant's realty for payment of his ancestor's debts (*t*). But where the infant charges his realty in order to secure advances made to pay for necessaries, his mortgage is not void but voidable; it cannot be enforced during infancy, and is not binding on him till he affirm after reaching majority (*u*). If the infant has been guilty of fraud in making the mortgage, and the parties cannot be restored to their original positions, the infant will be held bound by the deed (*x*).

Custom.—An infant's acts may by virtue of express custom bind him; thus, by the custom of gavelkind an infant of either sex and in actual possession of the land may validly aliene it at the age of fifteen by feoffment (*y*); but this liberty is only allowed under such limitations and restrictions that he is not thereby wronged or imposed upon (*z*); in other words, there must be full valuable consideration for the sale and feoffment (*a*).

An infant is liable for a customary fine of copyhold if he occupy (*b*). He may by special custom surrender copyhold by way of alienation or otherwise, and be bound by the surrender, but if there be no such special custom, his surrender is voidable (*c*).

Partnership.—At common law an infant may be a partner. In the important case of *Goode* v. *Harrison* (*d*), Bayley, J.,

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(*r*) Coote, Mort. 219.
(*s*) 15 Geo. V. c. 18, s. 71.
(*t*) 11 Geo. IV. & 1 Wm. IV. c. 47, and 2 & 3 Vict. c. 60.
(*u*) *Martin* v. *Gale*, 4 Ch. D. 428; 46 L. J. Ch. 84.
(*x*) See *Watts* v. *Haiswell*, cited in *Earl of Buckinghamshire* v. *Drury*, 2 Ed. 73; S. C. *Earl of Clare* v. *Bedford*, 13 Vin. Abr. 536; also *Watts* v. *Cresswell*, 9 Vin. Abr. 415.
(*y*) Robinson, Gavelk. 248—250.
(*z*) 4 Bac. Abr. (7th edit.) p. 49.
(*a*) *Re Maskell and Goldfinch's Contract*, [1895] 2 Ch. 525; 64 L. J. Ch. 678.
(*b*) *Evelyn* v. *Chichester*, 3 Burr. 1717.
(*c*) Macph. Inf. 473; *Nayler* v. *Strode*, 2 Ch. Rep. 392; *Zouch* v. *Parsons*, 3 Burr. 1794.
(*d*) 5 B. & Ald. 147.

said: "It is clear that an infant may be in partnership. It is true that he is not liable for contracts entered into during his infancy, but he still may be a partner. If he is in point of fact a partner during his infancy, he may, when he comes of age, elect if he will continue the partnership or not" (*e*). Lord Lindley (*f*) is of opinion that notwithstanding the second section of the Infants' Relief Act, 1874, a person who on attaining majority retains a share in a partnership or company cannot retain it without its incidental obligations on the doctrine of holding out (*g*). But the effect of the section is to render him in no way liable for the prior debts contracted during his infancy, and if on attaining twenty-one he elect to avoid the contract of partnership, he may recover back any money paid in part performance of the contract, if he has reaped no advantage, and there is a total failure of consideration, and he can restore the other party to the same position as before the contract (*h*), but if he has enjoyed any part of the consideration, or enjoyed some advantage sufficient to constitute valuable consideration for the contract to become a partner, he cannot recover (*i*). It has been held that an infant who paid a premium on joining a partnership could not on attaining twenty-one, disaffirm the contract, or prove in the bankruptcy of his partner (*k*). But "notwithstanding the general irresponsibility of an infant, he cannot, as against his co-partners, insist that in taking the partnership accounts he shall be credited with profits and not be debited with losses. He must either repudiate or abide by the agreement under which alone he is entitled to any share of the profits" (*l*). As an infant is not responsible for the torts of his agent, an infant partner cannot be made liable for the misconduct of his co-partners. The irresponsibility of an infant as a partner seems therefore to be complete except in cases of fraud (*m*). Where an infant is a member of a firm, a judgment against the firm simply for its debts or liabilities cannot be recovered; but a judgment against "the defendants other than" the infant partner may be recovered (*n*);

(*e*) See per Herschell, L.C., in *Lovell* v. *Beauchamp*, [1894] App. Cas. 607, 611; 63 L. J. Q. B. 802.
(*f*) Part 84.
(*g*) See *Cork and Bandon Railway Co.* v. *Cazenove*, 10 Q. B. 935.
(*h*) *Corpe* v. *Overton*, 10 Bing. 252; *Everitt* v. *Wilkins*, 29 L. T. 846.
(*i*) *Holmes* v. *Blogg*, 8 Taunt. 508.
(*k*) *Ex parte Taylor*, 8 De G. M. & G. 254.
(*l*) Lind. Part. 83.
(*m*) *Ibid.*
(*n*) *Lovell* v. *Beauchamp* (*ubi sup.*).

and if an act of bankruptcy has been committed by the firm a receiving order cannot be made against the firm simply, but should be made against the firm "other than" the infant partner (*o*). The infant's fraud will be visited with like results in partnership as in other contracts, and his fraudulent representations will bind him (*p*).

Shareholding.—An infant may be a shareholder. Infant shareholders are not mere contractors, for then they would be exempt, but in truth they are purchasers who have acquired an interest, not in a mere chattel, but in a subject of a permanent nature, either by contract with the company, or purchase or devolution from those who have contracted, and with certain obligations attached to it, which they were bound to discharge, and have been thereby placed in a situation analogous to an infant purchaser of real estate who has taken possession, and thereby becomes liable to all the obligations attached to the estate. The infant's engagement is voidable, and he may have his name removed fom the register of the company, unless, perhaps, he has been guilty of fraud (*q*). Thus, his signing the memorandum of association does not absolutely fix him with liability, though he remains a member until he repudiates his shares (*r*); his application for shares (*s*), and the payment of calls and receiving of dividends, have the like effect (*t*). But though an infant may repudiate, he will not be entitled to recover money paid on allotment or on a call unless there has been a total failure of consideration, and where it was proved that the shares had at one time been of substantial value it was held that there was no such total failure (*u*).

Transfer.—The company has the corresponding privilege of rejecting the infant as shareholder on ascertaining the fact of his infancy, and can put his transferor in his place (*x*); but if his transferee has been accepted by the company as a shareholder, the transfer by the infant cannot be treated as a nullity (*y*). The transfer, then, to an infant is voidable not

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(*o*) *Lovell* v. *Beauchamp*, [1894] A. C. 607; 63 L. J. Q. B. 802.
(*p*) Lind. Part. 83. (*q*) See *post*, p. 809.
(*r*) See *Re Nassau Phosphate Co.*, 2 Ch. D. 610; 45 L. J. Ch. 584.
(*s*) *Ebbet's Case*, L. R. 5 Ch. App. 302; 39 L. J. Ch. 497.
(*t*) *Lumsden's Case*, L. R. 4 Ch. App. 31.
(*u*) *Steinberg* v. *Scala* (*Leeds*), *Lim.*, [1923] 2 Ch. 452; 92 L. J. K. B. 944, overruling *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.*, [1894] 3 Ch. 589; 63 L. J. Ch. 795, unless that case was distinguishable on the ground that the shares there were of no marketable value as to which there was no evidence.
(*x*) *Castello's Case*, L. R. 8 Eq. 504; *Symon's Case*, L. R. 5 Ch. App. 298.
(*y*) *Gooch's Case*, L. R. 8 Ch. App. 266; 42 L. J. Ch. 381.

only by the infant on attaining age, or within a reasonable time after coming of age, but also by the company, unless it has accepted him, knowing him to be an infant, or has allowed him to transfer and has accepted his transferee (*z*).

Repudiation.—Unless the infant repudiate his shares within a reasonable time after attaining majority, he will be bound and placed on the list of contributories (*a*).

The infant may repudiate his shares during minority or within a reasonable time after coming of age (*b*). If he does not repudiate his shares he must pay calls like any other shareholder; but on repudiation he will not be liable for calls unless he has received any profits out of the concern (*c*); but he cannot hold the shares and decline to pay the calls in respect of them (*d*). His repudiation must be clear and explicit (*e*), otherwise he will be held to have ratified the contract by acquiescence (*f*).

When the company is ordered to be wound up before the infant reaches his majority the transfer of shares to him becomes inoperative, on the ground of prejudice to the infant (*g*). It has been held that a transfer under such circumstances is not a mere nullity *ab initio* (*h*); and Lord Lindley (*i*) writes that he "is not aware of any case in which an infant has been put on the list of contributors. Upon principle, however, there does not appear to be any reason why he should not, if it be for his benefit; and this, if there are surplus assets, may be the case." So, too, Page Wood, L.J., in *Capper's Case* (*k*) admits that difficulties might arise as to the effect of a transfer to an infant, "for it would seem that the infant ought to have an option whether he will repudiate or ratify the transfer." But there are two cases (*l*) which approach closely to a decision that such

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(*z*) Lind. Comp. 828, and the cases there cited.

(*a*) *Shrapnell's Case*, cited Lind. Comp. 810.

(*b*) *Newry and Enniskillen Railway Co.* v. *Coombe*, 18 L. J. Ex. 325; *Dublin and Wicklow Railway Co.* v. *Black*, 22 L. J. Ex. 94.

(*c*) *Newry and Enniskillen Railway Co.* v. *Coombe* (*ubi sup.*).

(*d*) *Ibid.*

(*e*) *North-Western Railway Co.* v. *M'Michael*, 20 L. J. Ex. 97; *Birkenhead and Cheshire Junction Railway Co.* v. *Pilcher*, 20 L. J. Ex. 97.

(*f*) *Cork and Bandon Railway Co.* v. *Cazenove*, 10 Q. B. 935. See *post*, chap. iii., Ratification and Avoidance of Contracts.

(*g*) *Litchfield's Case*, 3 De G. & S. 141; *Reid's Case*, 24 Beav. 318; *Capper's Case*, L. R. 3 Ch. App. 458; *Mann's Case*, *ibid.*; *Lumsden's Case* (*ubi sup.*).

(*h*) Per Selwyn, L.J., in *Lumsden's Case* (*ubi sup.*).

(*i*) Comp. 809.

(*k*) 3 Ch. App. 461.

(*l*) *Castello's Case*, L. R. 8 Eq. 504; *Symon's Case*, L. R. 5 Ch. App. 298. The *ratio decidendi* of these cases is that the winding-up fixes the status of the contributory.

transfer is a nullity; they decided that a person who was an infant when the winding-up commenced could not on his attaining twenty-one elect to hold shares transferred to him, and thereby defeat the right of the company to reject him, and to have his transferor put on the list in his place; but where it is clearly not for his benefit, he will not be liable. This right to treat the transfer as inoperative is not peculiar to the infant, but the company, or, if the company is in liquidation, the liquidator may remove the infant's name from the register, and put on that of his transferor (*m*). But the company may lose this right if it be guilty of laches prior to the winding-up (*n*). The infant does not lose his right of repudiation on his part by mere delay (*o*). The person who takes shares direct from a company in the name of an infant, in the event of the company being wound up, will usually be held liable for contributions in respect of them and not the infant (*p*); also where the infant's name is used as an alias by the purchaser (*q*).

Membership of Friendly Society.—Infants above one year of age may be members of a "friendly society" unless provision to the contrary be made in the rules of the society, and, subject to such rules, may enjoy all the rights of members (*r*). So he may be a member of a building society, unless its rules prohibit his admission (*s*); and he can consent to the society being dissolved (*t*). If the infant member is over sixteen he may by himself, and if under that age by his parent or guardian, execute all instruments and give all acquittances necessary to be executed or given under the rules (*u*); but he shall not be a member of the committee, or a trustee, or manager or treasurer of the society or of a branch (*x*). He may be a member of an industrial society if over sixteen years of age, unless its rules provide to the contrary, and may enjoy (subject to the rules) all the rights of a member, except he shall not be a member of the committee, trustee, manager, or treasurer, and

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(*m*) Lind. Comp. 811; *Symon's Case* (*ubi sup.*).
(*n*) *Parson's Case*, L. R. 8 Eq. 656.
(*o*) *Shrapnell's Case*, cited Lind. Comp. 810.
(*p*) *Weston's Case*, L. R. 5 Ch. App. 614; 39 L. J. Ch. 753.
(*q*) *Richardson's Case*, L. R. 19 Eq. 588; 44 L. J. Ch. 252.
(*r*) 59 & 60 Vict. c. 25, s. 36, sub-s. 1 (The Friendly Societies Act, 1896). Under the Friendly Societies Act, 1855 (18 & 19 Vict. c. 63), infants six years old could be admitted.
(*s*) 37 & 38 Vict. c. 42, s. 38.
(*t*) *Dennison* v. *Jeffs*, [1896] 1 Ch. 611; 65 L. J. Ch. 435.
(*u*) This removes a doubt expressed in *Rudd* v. *James*, [1896] 2 Ch. 554; 65 L. J. Ch. 781.
(*x*) 59 & 60 Vict. c. 25, s. 36 (2).

may execute all instruments and give all acquittances necessary to be executed or given under the rules (*y*). The like provisions apply to his membership of a trade union (*z*). Though an infant may become a member of such society and give all necessary acquittances, yet he cannot execute a valid mortgage of his real estate to secure advances made to him by the society. Such mortgage is absolutely void under the Infants' Relief Act, 1874. But on the other hand the society becomes entitled to a lien upon the property and title-deeds for the purchase-money which they may have paid for the infant to the vendor (*a*).

Infant Traders.—There is nothing in law to prevent an infant from being engaged in trade, and he might maintain an action for slander which might injure him in his trade (*b*), but since the Infants' Relief Act, 1874, all his contracts in respect of it are void and unenforceable against him (*c*). The mere fact that he carries on a trade is no representation that he is of age (*d*), and, although it may be of benefit to him to learn and carry on a trade, neither contracts to buy (*e*) nor contracts to sell goods made by an infant trader can be enforced against him (*f*), unless it can be proved that in substance the cause of action arose *ex delicto* (*g*).

Binding Contracts.—There are certain contracts which it is to the advantage of the infant should bind him. To hold them void, or even voidable, would be more to his detriment than profit; others, again, the interests of society demand should hold him bound by. As to the contract of marriage, see Part I., ch. iii.; breach of promise of marriage, see Part I., ch. v.; and marriage settlements, see *post*, ch. iv.

Contracts for Necessaries.—To the general rule of law that an infant is incapable of binding himself by a contract there is an exception introduced for the benefit of the infant himself. This exception is that he may make a contract for necessaries. And, as is accurately stated by Parke, B., in *Peters* v. *Fleming* (*h*): "From the earliest time down to the present the word necessaries is not confined in its strict sense to such

(*y*) 56 & 57 Vict. c. 39, s. 32.
(*z*) 39 & 40 Vict. c. 22, s. 9.
(*a*) *Thurstan* v. *Nottingham Permanent Building Society*, [1903] A. C. 6.
(*b*) *Wilde* v. *Tomkinson*, 5 L. J. K. B. 265.
(*c*) *Ex parte Jones*, *Re Jones*, 18 Ch. D. 109, 121; 30 L. J. Ch. 673.
(*d*) *Ibid.*
(*e*) *Bruce* v. *Warwick*, 6 Taunt. 118; *Ex parte Jones* (1881), 18 Ch. D. 109.
(*f*) *Cowern* v. *Nield*, [1912] 2 K. B. 419; 81 L. J. K. B. 865.
(*g*) *Ibid.*
(*h*) 6 M. & W. at p. 46; 9 L. J. Ex. 81.

articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station, and degree in life in which he is; and, therefore, we must not take the word necessaries in its unqualified sense, but with the qualification above pointed out" (*i*).

The question here to be discussed deals with things necessary for the support of life, and becoming to the infant in his social station. If an infant could not obtain such things he would be in a poor plight; if he could not obtain credit in their purchase, not only might he starve from hunger, cold, or neglect, but be excluded from his rightful place in society, though in the immediate future he might have ample means to purchase them. To obtain credit his direct or implied promise to pay for them must be enforced; and his "single" bond (that is, one without a penalty) for necessaries, including teaching or instruction, may be enforced against him (*k*). The principle upon which an infant is made liable for necessaries is an implied obligation on his part as a person who, by reason of disability, cannot contract to pay for such necessaries out of his own property (*l*). This implied obligation extends to the case of an infant pauper supported at the expense of the rates; and Poor Law guardians are entitled to recover six years' arrears of maintenance of such pauper infant (*m*).

The question of necessaries is one of mixed law and fact.

Province of Judge and Jury.—It may now be taken to be settled that it is the province of the judge to hold whether the things supplied are *prima facie* necessaries, and if not *prima facie* necessaries, whether there is any evidence to satisfy the onus cast on the plaintiff of proving that the articles supplied are, owing to the special circumstances of the case, within the category of necessaries (*n*). If the judge is of opinion that under no circumstances could the things supplied be held to be necessaries (that is, no reasonable and proper evidence could be offered to satisfy the jury that they were necessaries) (*o*), it is

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(*i*) Per Willes, J., in *Ryder* v. *Wombwell*, L. R. 4 Ex. 32, 38; 38 L. J. Ex. 8.

(*k*) Co. Litt. 172 a; *Pickering* v. *Jacobs*, March, 145; *Russel* v. *Lee*, 1 Lev. 86. See *Walter* v. *Everard*, [1891] 2 Q. B. 369; 60 L. J. Q. B. 738.

(*l*) See *Re Rhodes*, *Rhodes* v. *Rhodes*, 44 Ch. D. J. 94; 59 L. J. Ch. 298.

(*m*) *Re Clabbon* (*Infant*), [1904] 2 Ch. 465; 73 L. J. Ch. 853.

(*n*) *Ryder* v. *Wombwell*, L. R. 4 Ex. 32; 38 L. J. Ex. 8.

(*o*) As, for instance, "earrings for a male, spectacles for a blind person, a wild animal, daily dinners of turtle and venison for a month, or a coach and four for a clerk on £1 a week." Per Bramwell, B., in *Ryder* v. *Wombwell* (*ubi sup.*).

his duty to non-suit the plaintiff (*p*), and now in the High Court to enter judgment for the defendant (*q*), or he may, after leaving the question to the jury, say after verdict that there was no evidence to support the verdict (*r*). The province of the jury is to say whether the things supplied were necessaries for the infant. They are not at liberty to find any and everything to be a necessary, as they please. The circumstances of the infant, his rank, degree, and fortune are first to be inquired into, and then the nature of the things supplied him. Willes, J., on this point said (*s*): "We quite agree that the judges are not to determine facts, and therefore where evidence is given as to any fact, the jury must determine whether they believe it or not. But the judges do know, as much as juries, what is the usual and normal state of things, and consequently whether any particular article is of such a description as that it may be a necessary under such usual state of things" (*t*). When the judge has left the question to the jury, it is for them to determine on the evidence whether the things supplied were or were not under the circumstances of the case necessaries so as to bind the infant purchaser. But their verdict in this as in other matters is not conclusive, but subject to review: and if held to be given against the weight of evidence, a new trial may be ordered (*u*). Indeed, there must be some limit imposed upon the power of juries to find what things are or are not necessaries. Jurymen are principally drawn from the trading classes, and have a not unnatural bias in favour of the plaintiff, which is increased by a sense that it is shabby on the part of a grown-up infant who is of an extravagant bent to plead infancy in order to shirk his responsibilities, though he has willingly availed himself of his opportunities to gratify his tastes.

What are Necessaries.—It would be quite superfluous, not to say impossible, to attempt to give an exhaustive list of what things have been held necessaries and non-necessaries. The varied and various circumstances that must be taken into consideration in the different cases, the quantity and quality of the articles supplied, the rank, fortune, station, and prospects of

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(*p*) *Bryant* v. *Richardson*, L. R. 3 Ex. 93 n. In *Mackarell* v. *Bachelor*, Cro. Eliz. 583, the Court appears to have decided this question upon demurrer.

(*q*) *Stocks* v. *Wilson*, [1913] 2 K. B. 235; 82 L. J. K. B. 598.

(*r*) *Ibid.*

(*s*) *Ryder* v. *Wombwell*, L. R. 4 Ex. p. 40.

(*t*) Cockburn, C.J., in *Jenner* v. *Walker*, 19 L. T. 398, followed this ruling, but thought that it had altered the law.

(*u*) *Ryder* v. *Wombwell* (*ubi sup.*); *Harrison* v. *Fane*, 1 M. & G. 550.

the infant, render it impracticable to lay down any hard-and-fast rules, or to cite instances as conclusive guides *in omnibus*. The following cases are mere examples of what under their particular circumstances have been held to be necessaries, and what not necessaries.

An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic (*x*), and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards (*y*), that is, instruction which would fit for a profession, or trade, or business (*z*). This has been extended (*a*) to articles fit to maintain the particular person in the state, station, and degree of life in which he is. In short, the term "necessary" is relative; it is a flexible and not an absolute term (*b*). "Necessaries" are defined by the Sale of Goods Act, 1893 (*c*), to mean goods suitable to the condition in life of an infant and to his actual requirements at the time of the sale and delivery. Things necessary to a person in one station of life may be quite unnecessary, and even wanton extravagance, in a person in another station of life. So, too, things which would be unnecessary for the same individual under one set of circumstances may under another be necessary. Thus, expensive articles of diet, which would be unnecessary for a man in health, may become necessary when ordered to be taken by him under medical advice (*d*).

Utility a Partial Test.—The utility of an article does not seem to be an unfair test as to whether it is necessary or not. Articles of mere ornament or luxury cannot well be necessaries; but an article if useful ought not to be held unnecessary simply because it is ornamental and luxurious, if it is of such a descrip-

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(*x*) This would be held to include medical attendance, and not merely the supply of medicine. See *Huggins* v. *Wiseman*, Carth. 110.

(*y*) Co. Litt. 172 a. The "good teaching or instruction" has been held to comprehend that general education which is required by his station in life (*Manby* v. *Scott*, 1 Sid. 112); but special instruction, with a view to the exercise of a particular calling, has in one case been excluded; thus, where a brother advanced £40, as a premium for taking his sister as an apprentice to learn millinery, Lord Kenyon was of opinion that it could not be considered as a necessary, and therefore that the payment could not be enforced in a Court of law (*Smith* v. *Gibson*, Peake, Add. Cas. 52). But see *Walter* v. *Everard*, [1891] 2 Q. B. 369; 60 L. J. Q. B. 738. In an American case it was held to be a *prima facie* rule that a college education could not be ranked among those necessaries for which an infant could render himself absolutely liable. *Middlebury College* v. *Chandler*, 16 Vt. 683. See *Pickering* v. *Gunning*, Sir Wm. Jones, 182.

(*z*) *Walter* v. *Everard* (*ubi sup.*); *Cooper* v. *Simmons*, 31 L. J. M. C. 138 (apprenticeship); *Green* v. *Thompson*, [1899] 2 Q. B. 1; 68 L. J. Q. B. 719.

(*a*) Per Parke, B., in *Peters* v. *Fleming*, 6 M. & W. 42, 46.

(*b*) Per Thomas, J., in *Breed* v. *Judd*, 1 Gray, 458 (Amer.).

(*c*) 56 & 57 Vict. c. 71, s. 2.

(*d*) See *Wharton* v. *Mackenzie*, 13 L. J. Q. B. 130.

tion as might well comport with the rank and fortune of the infant (*e*). In all cases there must be personal advantage from the contract derived to the infant himself (*f*). Whether such article is or is not a necessary, is properly to be left to the jury (*g*). In addition to the ordinary necessities of life, such as meat, drink, clothing, and lodging (*h*), the following have been held necessaries (*i*): livery for the servant of a captain in the army (*k*); a volunteer's uniform (*l*); a light cart for an officer in the army, such as was used by nearly all officers (*m*); a gold watch-chain, rings, and two gold pins, for an undergraduate, eldest son of a man of fortune (*n*); payment of money to release an infant from arrest (*o*), or to save him from ejectment for non-payment of rent (*p*). Necessaries for an infant's wife are necessaries for him (*q*). Presents of jewellery for an intended bride may, it seems, be held necessary for a person in a good pecuniary position (*r*); and costs of a marriage settlement (*s*). Furniture may be a necessary for an infant about to be married, but where a number of curios, snuff-boxes, and Burmese articles, which the judge described as unjustifiable extravagances were included with the furniture under one contract the contract was not binding (*t*). An article not *prima facie* a necessary may become so under special circumstances, as a horse, or carriage exercise ordered by a doctor (*u*); a racing bicycle has been held to be such, though the infant was living with his parents (*x*). A motor-car hired by an infant to carry his luggage a distance of six miles if hired at ordinary rates would have been necessary, but being hired at the infant's risk it was not a contract for necessaries (*y*). Whether legal expenses disbursed on behalf

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(*e*) *Peters* v. *Fleming*, 6 M. & W. 42.
(*f*) *Chapple* v. *Cooper*, 13 M. & W. 252, 258; 13 L. J. Ex. 286.
(*g*) *Maddox* v. *Miller*, 1 M. & S. 738.
(*h*) *Lowe* v. *Griffith*, 1 Scott, 458. An infant may contract for the use and occupation of necessary lodgings, and he will be liable on assumpsit for a reasonable rent, but not on his covenant to pay a fixed rent. Macph. Inf. 501.
(*i*) Collected in Simp. Inf. 91, 92.
(*k*) *Hands* v. *Slaney*, 8 T. R. 578.
(*l*) *Coates* v. *Wilson*, 5 Esp. 152. This was "in perilous times, when young men enrolled themselves in different corps for the defence of the country."
(*m*) *Bernard* v. ——, cited 7 C. & P. 52.
(*n*) *Peters* v. *Fleming* (*ubi sup.*).
(*o*) *Male* v. *Roberts*, 3 Esp. 163; *Clark* v. *Leslie*, 5 Esp. 28.
(*p*) *Ex parte M'Key*, 1 Ba. & B. 405.
(*q*) *Turner* v. *Frisby*, 1 Stra. 168.
(*r*) *Jenner* v. *Walker*, 19 L. T. 398.
(*s*) *Helps* v. *Clayton*, 10 Jur. (N.S.) 1184.
(*t*) *Stocks* v. *Wilson*, [1913] 2 K. B. 235; 82 L. J. K. B. 598.
(*u*) *Hart* v. *Prater*, 1 Jur. 623.
(*x*) *Clyde Cycle Co.* v. *Hargraves*, 78 L. T. 296.
(*y*) *Fawcett* v. *Smethurst*, 84 L. J. K. B. 478.

of the infant were or were not necessaries would probably depend upon whether the legal proceedings were properly and reasonably undertaken. If they were necessary, or incurred clearly for his benefit, they would in all likelihood be recovered against him, but the *onus probandi* would be on his legal adviser (*z*). If the infant contracts for necessaries he impliedly promises to pay for them, but if another undertakes to pay for the goods supplied, this express agreement would seem to take away the implied contract on the part of the infant (*a*); but an infant is not liable on a bill of exchange accepted by him, though for the price of necessaries (*b*). Where necessaries are sold to an infant he must pay a reasonable price for them (*c*); the action not being based upon the contract, the contract price is not recoverable (*d*).

The following have been held not to be necessaries: Cockades for some of the soldiers of a company commanded by the infant (*e*); a chronometer costing £68 for a lieutenant in the navy not in commission (*f*); expensive dinners and desserts supplied to an undergraduate in his private rooms (*g*); cigars and tobacco (*h*); a pair of jewelled solitaire studs worth £25, and a silver goblet worth fifteen guineas, though the infant was a baronet's son and moved in the upper ranks of society (*i*); highly ornamented betting books costing £15, and ornamented jewellery and stationery of very expensive nature (*k*); and an expensive hunter (*l*). As the trading contracts of infants are void (*m*), wares furnished to him to be sold again, or work done for him in the way of his trade, cannot be recovered for as necessaries, though he may gain his living by the business (*n*).

Infant already Supplied with Necessary Articles.—The next question to be considered is whether, if an infant be already

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(*z*) On the same principle as the liability of the husband of a married woman for her legal expenses; her solicitor must show that they were reasonably incurred in her behalf. See Part I. chap. xii. p. 305.

(*a*) *Duncomb* v. *Turkridge*, 9 Vin. Abr. Enf. 2, 392.

(*b*) *Re Soltykoff, Ex parte Margrett*, 60 L. J. Q. B. 339.

(*c*) 56 & 57 Vict. c. 71, s. 2.

(*d*) *Nash* v. *Inman*, [1908] 2 K. B. 18; 77 L. J. K. B. 626.

(*e*) *Hands* v. *Slaney* (*ubi sup.*).

(*f*) *Berolles* v. *Ramsay*, Holt, N. P. 77.

(*g*) *Brooker* v. *Scott*, 11 M. & W. 67; *Wharton* v. *Mackenzie*, *Cripps* v. *Hill*, 13 L. J. Q. B. 130.

(*h*) *Bryant* v. *Richardson*, L. R. 3 Ex. 93 n.

(*i*) *Ryder* v. *Wombwell*, L. R. 4 Ex. 32; 38 L. J. Ex. 8.

(*k*) *Jenner* v. *Walker*, 19 L. T. 398.

(*l*) *Skrine* v. *Gordon*, Ir. Rep. 9 C. L. 479.

(*m*) *Ex parte Jones*, *Re Jones*, 18 Ch. D. 109; 30 L. J. Ch. 673.

(*n*) *Dilk* v. *Keighley*, 2 Esp. 480; *Lowe* v. *Griffith*, 1 Scott, 458.

supplied with necessary articles, a tradesman, not knowing of his being so supplied, furnishes him with other articles of like description, the latter are necessaries so as to entitle the tradesman to recover, and whether the tradesman is bound to make inquiries concerning the infant's income and general circumstances. The current of authority ran very strongly in the direction of holding that a tradesman supplied an infant on credit at his own risk, and that if the latter was already properly supplied with like articles, the former could not recover (*o*). The tradesman was not bound to make inquiries, and a non-suit or adverse verdict did not necessarily follow on his neglect to do so, but he supplied the infant at his peril (*p*). Evidence used to be admitted to show that the defendant was so supplied (*q*), but in *Ryder* v. *Wombwell* (*r*), Kelly, C.B., at the trial, and the Court *in banc* (Kelly, C.B., Channell, and Pigott, B.B., Bramwell, B., dissenting) upheld the Lord Chief Baron, and refused to admit such evidence, and the Court of Exchequer Chamber forbore on appeal to decide the point as being unnecessary, saying it was a question of some nicety, and the authorities by no means uniform, adding: "If ever the point again arises, the Court before which it comes must determine it on the balance of authority and on principle, without being fettered by a decision of this Court" (*s*). In a later case, however, the Court following the earlier decisions, and not that of *Ryder* v. *Wombwell* on this point, held that evidence that the defendant was already sufficiently supplied with articles of the same kind ought to be admitted and left to the jury, though the plaintiff was ignorant of his being so supplied, and that the jury are to judge of the effect of that supply on the question of necessaries (*t*). This decision was followed in a later case by members of the Court of Appeal sitting as a Queen's Bench Divisional Court (*u*), and later by the Court of Appeal. A tailor supplied an undergraduate at Cambridge with clothing including eleven fancy waistcoats at two guineas each and sued for a sum of £122 incurred in nine

(*o*) *Bainbridge* v. *Pickering*, 2 W. Bl. 1325; *Ford* v. *Fothergill*, 1 Esp. 211; *Foster* v. *Redgrave*, L. R. 4 Ex. 35 n.

(*p*) *Brayshaw* v. *Eaton*, 5 Bing. N. C. 231.

(*q*) *Burghart* v. *Angerstein*, 6 C. & P. 690.

(*r*) *Ubi sup.*

(*s*) Per Willes, J., who delivered the judgment of the Court, L. R. 4 Ex. 42; 38 L. J. Ex. 8.

(*t*) *Baines* (or *Barnes*) v. *Toye*, 13 Q. B. D. 410; 53 L. J. Q. B. 567.

(*u*) *Johnstone* v. *Marks*, 19 Q. B. D. 509; 57 L. J. Q. B. 6. For legislative sanction of these decisions, see 56 & 57 Vict. c. 71, s. 2; *ante*, p. 790.

months. For the defence the father proved an ample supply of clothes according to the position in life of the infant, the father being an architect with a town and country house, and the Court held that in such an action the onus is on the plaintiff to prove not only that the goods supplied were suitable to the condition in life of the infant but that he was not sufficiently supplied with goods of that class at the time of the sale and delivery (*x*).

The mere fact of an infant having an income out of which he could pay ready money for goods supplied is not equivalent to his being actually supplied, nor prevents him from contracting for necessaries on credit (*y*). Again, the apparent means and an ostentatious display on the part of the infant do not render it any the less necessary for the tradesman to inquire into his circumstances. The case of *Dalton* v. *Gib* (*z*) appears to be an authority for the proposition that the apparent means of the buyer are a material element in deciding whether the tradesman ought or ought not to have made inquiries; but the decision may be referred to other grounds, that the purchase of the goods was sanctioned by the mother, and that the infant herself had told the plaintiff that she had expectations.

Where an infant resides with his parents or guardians who provide such things as appear to them to be proper, so that he is not destitute of real necessaries, he cannot be bound for what under other circumstances might be necessaries, on the ground that what is sufficient and proper must be left to the discretion of those who have the custody and control of the infant: thus, if a father provide his infant child with proper clothing, clothes furnished to the infant are not necessaries (*a*). If a tradesman supplies an infant under such circumstances with goods, he does so eminently at his own risk, and has the onus of proof of necessaries cast upon him, for it is presumed that when an infant resides at home he is properly maintained (*b*). It would be otherwise if the infant were emancipated from such control.

(*x*) *Nash* v. *Inman*, [1908] 2 K. B. 1; 77 L. J. K. B. 626.

(*y*) *Burghart* v. *Hall*, 4 M. & W. 727, in which *Mortara* v. *Hall*, 6 Sim. 465, decided to the contrary, was doubted, and it may be considered to be no longer law.

(*z*) 7 Scott, 117. The facts of this case were: The mother of the infant daughter, the defendant, sat in her carriage while her daughter purchased expensive goods at the plaintiff's shop; some of the goods were taken away in the carriage, others delivered at the hotel where the mother and daughter were residing.

(*a*) *Cook* v. *Deaton*, 3 C. & P. 114.

(*b*) *Bainbridge* v. *Pickering*, 2 W. Bl. 1325; see also *Brayshaw* v. *Eaton*, 5 Bing. N. C. 231.

These three last considerations may be thus summed up. The tradesman is not bound to inquire into the income or circumstances of the infant, or whether he is already supplied with like articles. His non-inquiry would not prejudice his right to recover, if the goods supplied were necessaries, any more than his inquiry (in which he was deceived) would entitle him to recover if the goods supplied were not necessaries. In short, he trusts the infant at his peril. The apparent means or ostentatious display of the infant do not render it less risky for the tradesman to trust him; and where the infant resides with his parents or guardians, the onus of proof of necessaries is cast upon the plaintiff.

Money Lent for Necessaries.—Money lent to an infant to be laid out in the purchase of necessaries, and which has been so laid out, cannot at law be recovered by the lender, for by lending the money to the infant he has put it in his power to misapply it (*c*); but if the money be laid out in necessaries under the eye of the lender, the latter may recover it (*d*). In equity, however, an infant who borrowed money, and applied it towards payment of his debts for necessaries, was liable to refund it, though not at law (*e*). As the principles of equity now prevail in cases where they clash with those of law, a lender's claim will be upheld at law where it could have been upheld in equity (*f*). Advances made on account of a debt due to an infant to procure him necessaries have been held good and valid (*g*).

Bonds by Infant.—An infant's bond with a penalty (*h*), or an account stated (*i*), or bill of exchange (*k*) given for necessaries supplied (*l*), or a promissory note for price of furniture (*m*), does not bind him; and his deed binding his reversionary interest in realty in respect of advances for their purchase is voidable (*n*). He may bind himself by a bond without a penalty (*o*); and possibly by a note or instrument not negotiable (*p*). An acknow-

(*c*) *Darby* v. *Boucher*, Salk. 279.
(*d*) *Ellis* v. *Ellis*, 5 Mod. 368.
(*e*) *Marlow* v. *Pitfield*, 1 P. Wms. 558.
(*f*) See the analogous case of husband liable in equity for money advanced to wife for necessaries: *Deare* v. *Soutten*, L. R. 9 Eq. 151.
(*g*) *Hedgley* v. *Holt*, 4 C. & P. 104.
(*h*) *Rearsby* v. *Cuffer*, Godb. 219; Co. Litt. 162 a.
(*i*) *Williams* v. *Moor*, 11 M. & W. 256; 12 L. J. Ex. 253; 37 & 38 Vict. c. 62, s. 1.
(*k*) *Williamson* v. *Watts*, 1 Camp. 552.
(*l*) *Re Soltykoff, Ex parte Margrett*, [1891] 1 Q. B. 413; 60 L. J. Q. B. 339.
(*m*) *Valentini* v. *Canali*, 24 Q. B. D. 166; 59 L. J. Q. B. 74.
(*n*) *Martin* v. *Gale*, 4 Ch. D. 428; 46 L. J. Ch. 84.
(*o*) *Russel* v. *Lee*, 1 Lev. 86.
(*p*) See Campbell's note to *Williamson* v. *Watts* (*ubi sup.*); Co. Litt. 172 a.

ledgment by an infant of a debt for necessaries is enough to take it out of the Statute of Limitations (*q*).

Contracts of Service.—Contracts of service entered into by infants, whether by deed of apprenticeship or in the way of ordinary hiring, domestic or otherwise, are valid and binding upon them unless manifestly to their prejudice. If to their prejudice, they are not binding upon them, but may be avoided at their option. The principle on which those contracts are held binding on an infant is that they are not merely beneficial to him, but partake of the nature of "necessaries" for him, as providing for his maintenance or education and fitting out in some trade or profession (*r*). A contract of service is not a "necessary" in the sense that unless the infant entered into it, either he must perforce starve, or his position in life be necessarily seriously affected, but it partakes of the nature of a "necessary." Youth is the best time to learn; the mind and intellect readily expand; and the body, long before the age of majority is reached, is capable of sustaining much physical labour and fatigue. Again, the actual interests of the infants are served; they acquired a knowledge of handicrafts and trades which will stand them in good stead in after life. They, too, have the means of earning a livelihood and acquiring a sense of independence which will render them better able to take care of themselves in future life than if they were obliged to wait till they had reached twenty-one before they could learn a trade or earn a wage. The interests of society require that these contracts of service between masters and infant apprentices, and employers and the infants employed, should be as binding and valid as between adults, provided that they are not prejudicial to the infants; for if the latter could at any moment declare the contract no longer binding, trade and commerce would be endangered; employers never could be sure that their orders would be executed, and might have their works suspended from want of labour. To avoid these harmful results, a contract of service where one of the parties is under age ought to be and has been made binding on the infant unless manifestly to his prejudice. But in this as in other matters the inexperience and weakness of youth are to be protected and not taken advantage of; consequently when the infant has been imposed upon, and has entered into a contract manifestly to his

(*q*) *Williams* v. *Smith*, 4 El. & Bl. 180.
(*r*) See *Walter* v. *Everard*, [1891] 2 Q. B. 369; 60 L. J. Q. B. 738.

disadvantage, it is only fair and equitable that he should not be bound by it, but should have the power to resile from it at his option. But to hold even an inequitable contract as void *ab initio* is a doubtful advantage to the infant. The better opinion is that these inequitable or prejudicial contracts of service are not void, but only voidable at the option of the infant.

A contract of service by an infant is considered *prima facie* to be for his benefit; and he may bind himself by a deed of apprenticeship (*s*), or contract of ordinary service, as a domestic servant, farm labourer, operative and the like (*t*), unless it is manifestly disadvantageous to him, as where the master might stop the work whenever he chose, and retain the wages during the stoppage (*u*), or where the master is not to be liable to pay wages to the apprentice so long as his business should be interrupted or impeded by or in consequence of any turn-out, but that the apprentice during such turn-out might employ himself in any other manner or with any other person for his own benefit (*x*); or where a penalty or forfeiture is attached to the hiring (*y*). The inequitable and prejudicial terms must appear on the face of the contract, and not depend upon considerations outside of it; and the mere fact that more advantageous terms might have been secured for the infant does not render the contract not binding, if the actual terms were not exacting, hard, and disadvantageous to him, more especially if there were a justification for their presence in the necessities of trade and the labour market (*z*); and where a master merely provides against liability to pay wages while his business is at a standstill through an accident beyond his control (including strikes but not lock-outs), such provision does not render the deed inequitable and unenforceable against the apprentice (*a*). Though an infant apprentice cannot be sued on his covenants of service (*b*), or restrained by injunction from a breach of them (*c*), but must in certain cases be proceeded against in a Court of summary jurisdiction (*d*), yet if an infant enter into

(*s*) *Rex* v. *Arundel*, 5 M. & S. 257.
(*t*) *Keane* v. *Boycott*, 2 H. Bl. 511; *Rex* v. *Chillesford*, 4 B. & C. 94; *Wood* v. *Fenwick*, 10 M. & W. 195.
(*u*) *Reg.* v. *Lord*, 17 L. J. M. C. 181.
(*x*) *Meakin* v. *Morris*, 12 Q. B. D. 352; 53 L. J. M. C. 72.
(*y*) Co. Litt. 172 a; *Reg.* v. *Lord* (*ubi sup.*).
(*z*) *Leslie* v. *Fitzpatrick*, 3 Q. B. D. 229; 47 L. J. M. C. 22.
(*a*) *Green* v. *Thompson*, [1899] 2 Q. B. 1; 68 L. J. Ch. 719.
(*b*) *Gylbert* v. *Fletcher*, Cro. Car. 179.
(*c*) *De Francesco* v. *Barnum*, 45 Ch. D. 430; 60 L. J. Ch. 63 (Fry, L.J.).
(*d*) Under 38 & 39 Vict. c. 86, s. 5.

an ordinary contract of service which is beneficial to him, but in which there are reasonable restrictions by which he engages not to do certain acts detrimental to his employer on attaining majority he will be restrained by injunction from committing a breach of that engagement after he reaches majority (*e*). Where some provisions are disadvantageous yet on the whole the contract is beneficial for the infant it will be held binding on him (*f*); where it is entirely unfair and against the infant's interests it will not be enforced (*g*).

An infant may be bound apprentice to another infant (*h*) (in which case the contract is voidable); to his own father (*i*), or mother (*k*); to his master and his executor or administrator; and if the latter carry on the trade and afford as good instruction as that of the master, the apprentice cannot refuse to serve, and may be punished for deserting his service till the period of his articles is up, or he has disaffirmed on reaching majority (*l*).

A father has no common law right to bind his child as an apprentice (*m*), but the latter must execute the indenture as a proof of consent to be bound, either in person (*n*), or by agent (*o*). There is a statutory exception to this rule, for under the Poor Law Acts the guardians of unions or parishes have the power to bind as apprentices pauper children under twenty-one within their jurisdiction (*p*). But if any undue advantage were taken of the infant, the covenants would not be enforced against him.

As an infant cannot be sued on his covenants (*q*), it is usual for the father or other guardian of the infant to be a party to the indenture and covenant that the infant shall serve; and the covenantor is liable for the infant's default on this covenant (*r*),

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(*e*) *Cornwall* v. *Hawkins*, 41 L. J. Ch. 435; *Fellows* v. *Wood*, 59 L. T. 513; *Evans* v. *Ware*, [1892] 3 Ch. 502; and see *Brown* v. *Harper*, 68 L. T. 488.

(*f*) *Clements* v. *London and North-Western Railway Co.*, [1894] 2 Q. B. 482; 63 L. J. Q. B. 61; *Green* v. *Thompson*, [1899] 2 Q. B. 1; 68 L. J. Q. B. 719.

(*g*) *Corn* v. *Matthews*, [1893] 1 Q. B. 310; 62 L. J. M. C. 61; *De Francesco* v. *Barnum* (*ubi sup.*).

(*h*) *Rex* v. *St. Petrox*, 4 T. R. 196.

(*i*) *Rex* v. *Chillesford*, 4 B. & C. 94.

(*k*) *Gilbert* v. *Schwenck*, 14 M. & W. 488.

(*l*) *Cooper* v. *Simmons*, 31 L. J. M. C. 138.

(*m*) *Rex* v. *Aresby*, 3 B. & Ald. 584.

(*n*) *Ibid.*; *St. Nicholas* v. *St. Botolph*, 31 L. J. M. C. 258.

(*o*) *Rex* v. *Longnor*, 4 B. & Ad. 647.

(*p*) See 42 Geo. III. c. 46; 56 Geo. III. c. 139; 3 & 4 Wm. IV. c. 63; 7 & 8 Vict. c. 101, ss. 12, 13; 14 & 15 Vict. c. 11. See *post*, Part V. chap. v.

(*q*) *Gylbert* v. *Fletcher*, Cro. Car. 179.

(*r*) *Branch* v. *Ewington*, 2 Doug. 518.

though the latter avoid the covenant at twenty-one (*s*). The only exception to this rule is under the custom of the City of London, where the master can sue his infant apprentice on his covenant (*t*).

Enlistment of Infants.—For social and political reasons, infants are at liberty to contract binding engagements to serve the State, both in the army and navy (*u*), and when bound are liable to the provisions of the discipline Acts and regulations of their respective services. Infant apprentices, bound for four years and upwards, must be discharged from the army if claimed by their masters within a month from the date of their enlistment (*x*).

Liability for Torts.—An infant is liable for torts committed by him; thus, he is liable for trespass (*y*), for negligence in the control of a savage dog (the owner of the dog being seventeen years of age, the father was held not to be responsible for its control) (*z*), for slander (*a*), for false representation in carrying on a trade (*b*), for wrongly detaining goods (*c*), and for embezzling money (*d*); and if he give a charge on his property on coming of age to avoid being sued in tort for a wrong committed by him during infancy, the charge will be enforced (*e*). But he will not be liable where it is sought to convert an action really grounded on contract into one grounded upon tort, as on a warranty of goods sold (*f*), or for overriding a horse which he hired (*g*), nor, where a motor-car hired by an infant for a particular journey caught fire without negligence on an extension of the journey did the infant become guilty of a tort independent of contract (*h*). The cause of action to be enforceable must be proved in substance to arise *ex delicto* (*i*). But where he commits a separate and independent

(*s*) *Cuming* v. *Hill*, 3 B. & Ad. 59.
(*t*) *Horn* v. *Chandler*, 1 Mod. 271. This custom, it is said, was introduced for the purpose of promoting trade in the City.
(*u*) *Rex* v. *Rotherfield Greys*, 1 B. & C. 345; *Rex* v. *Walpole St. Peters*, Burr. S. C. 638; *Rex* v. *Hardwick*, 5 B. & Ald. 176.
(*x*) 42 & 43 Vict. c. 33, s. 92.
(*y*) Bac. Abr. Inf. H.
(*z*) *North* v. *Wood*, [1914] 1 K. B. 629; 83 L. J. K. B. 587.
(*a*) *Defries* v. *Davis*, 1 Bing. N. C. 692.
(*b*) *Chubb* v. *Griffiths*, 35 Beav. 127; *Woolf* v. *Woolf*, [1899] 1 Ch. 343; 68 L. J. Ch. 82.
(*c*) *Mills* v. *Graham*, 1 B. & P. N. R. 140.
(*d*) *Bristow* v. *Eastman*, 1 Esp. 172.
(*e*) *Re Seager, Seeley* v. *Briggs*, 60 L. T. 665.
(*f*) *Howlett* v. *Haswell*, 4 Camp. 118.
(*g*) *Jennings* v. *Rundall*, 8 T. R. 335.
(*h*) *Fawcett* v. *Smethurst*, 84 L. J. K. B. 473.
(*i*) *Cowern* v. *Nield*, [1912] 2 K. B. 419; 81 L. J. K. B. 865.

wrong apart from the contract, though arising out of the original contract, he is liable, and the plea of infancy affords no defence to the claim of the plaintiff for damages in respect of the wrong (*k*). He may be visited with the costs of the suit in which he is the defeated party (*l*).

(*k*) *Walley* v. *Holt*, 35 L. T. 631; *Burnard* v. *Haggis*, 14 C. B. (N.S.) 45.
(*l*) *Chubb* v. *Griffiths* (*ubi sup.*); *Woolf* v. *Woolf* (*ubi sup.*).

CHAPTER III.

RATIFICATION AND AVOIDANCE OF ACTS AND CONTRACTS.

Though their contracts were not binding on infants if within a reasonable time after attaining majority, they disaffirmed them; infants were bound where they promised on attaining majority (*a*) to abide by them, or expressly ratified them, or in certain kinds of contracts continued to derive advantages under them, which in fairness they could not be allowed to retain without being fully bound by the engagements from which they were derived, though liabilities were incidental thereto. Of void contracts there cannot, of course, be any ratification and such need not be expressly avoided, for no act on the part of either of the parties can give validity to that which never was valid or binding.

Ratification has been defined to be "any act or declaration which recognizes the existence of the promise as binding; as in the case of an agency, anything which recognizes as binding an act done by an agent, or a party who has acted as agent, is an adoption of it. Any written instrument signed by the party which in the case of adults would have amounted to the adoption of the act of party acting as agent, will in the case of an infant who has attained his majority amount to a ratification" (*b*). "Ratification," says Parke, B. (*c*), "is an admission that the party is *liable and bound* to pay the debt arising from a contract which he made when an infant." It has also been laid down that "a ratification necessarily has reference to the past, and, as applied to promises made by the person ratifying, a ratification is simply an intentional recognition of some previous promise made by him, and an adoption and confirmation of such promise with the intention of rendering it binding. In other words, a ratification of a voidable promise is a recognition of it

(*a*) *Slator* v. *Trimble*, 14 Ir. C. L. 342.

(*b*) *Harris* v. *Wall*, 1 Ex. 122. This definition was approved by the Court of Queen's Bench in *Rowe* v. *Hopwood*, L. R. 4 Q. B. 1; 38 L. J. Q. B. 1. But see the judgment of Martin, B., in *Mawson* v. *Blane*, 10 Ex. 206, 210.

(*c*) In *Mawson* v. *Blane* (*ubi sup.*), p. 210.

and an election not to avoid it, but to be bound by it" (*d*). The ratification by an adult of his acts done during infancy is similar to the ratification by a principal of the acts of his agent—the acts of the agent are not binding till formally endorsed and approved by the principal; accordingly, none of the voidable acts and contracts made by an infant were binding on him until he had adopted and confirmed them on reaching his majority; though in many cases the ratification need not have been of a precise and formal nature.

In the decisions and the statutes dealing with this subject, a distinction has been drawn between a promise made by an infant on his attaining majority to abide by his engagement entered into during infancy, and his ratification of it. The promise includes ratification, but ratification does not include a new promise; "ratification and confirmation mean something more than merely repeating the promise" (*e*). Again, a new and independent promise made after majority, though practically the same as the one made during infancy, is different from ratification; the former requires a fresh consideration to support it, whereas ratification does not necessarily require such new consideration (*f*). There cannot be any doubt that owing to the effect of section 2 of the Infants' Relief Act, 1874, the tendency of the Courts will be to look for new and independent promises supported by fresh considerations, rather than mere promises relating to the past transaction or ratification, which will be quite inoperative (*g*). Because of this Act there is no need to give instances of what has been held sufficient or insufficient to constitute a ratification of, or a new promise to abide by, acts done in infancy, which are within that statute, and so void, for to do so would be of no practical utility. Instances of practical ratification of other kinds of contracts will be given in their proper places.

Formal Character Unnecessary.—This confirmation need not have been in any particular or set method, but the infant might on attaining majority, by his general conduct, or express promise (if the ratification or confirmation was made

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(*d*) Per Lindley, J., in *Ditcham* v. *Worrall*, 5 C. P. D. 419; 49 L. J. C. P. 688.

(*e*) Per Ellenborough, C.J., in *Cohen* v. *Armstrong*, 1 M. & S. 724. His lordship thought it more correct to say that infants made new promises after they came of age, rather than ratified their former promises.

(*f*) *Ditcham* v. *Worrall*, 5 C. P. D. 410; 49 L. J. C. P. 688.

(*g*) See *Ditcham* v. *Worrall* (*ubi sup.*), and the conclusion arrived at by the majority of the Court, with which Coleridge, C.J., did not agree.

before action brought) (*h*), ratify and confirm his contracts made during infancy; and his contracts concerning property of a permanent nature to which obligations attach, or which involve continuous rights and duties, and he has taken benefits under them, unless disaffirmed by him within a reasonable time of reaching his majority, were binding on him (*i*). The ratification must have been after full knowledge and complete information respecting the transaction (*k*), and he must have known that he was discharged by his nonage (*l*).

Infants' Relief Act, 1874.—The Infants' Relief Act, 1874 (*m*), is the statute which now governs the contracts of infants, and by section 2 it provides that

"no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

The words of the first section of this Act (*n*) are perfectly general, and apply to all contracts of infants except those which are expressly excepted (*o*). So, too, in section 2, there are words of universal application. This section is divided into two parts; the first provides that an infant's promise made after age to pay *any debt* contracted during infancy, shall not be actionable, that is, shall not in any case form a valid consideration upon which an action can be brought; the second, that his ratification made after full age of *any promise or contract* made during infancy shall likewise be not actionable. Any new consideration given for such new promise or ratification shall be inoperative (*p*). In an Irish case (*q*), however, an action was held maintainable by an indorsee for value, against the acceptor of a bill of exchange, accepted by the latter after attaining twenty-one years of age, for a debt contracted during infancy, and after the passing of this Act, though not in respect of

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(*h*) *Thornton* v. *Illingworth*, 2 B. & C. 824.
(*i*) *Goode* v. *Harrison*, 5 B. & Ald. 147.
(*k*) *Kay* v. *Smith*, 21 Beav. 522.
(*l*) *Harmer* v. *Killing*, 5 Esp. 102.
(*m*) 37 & 38 Vict. c. 62.
(*n*) See *ante*, p. 777.
(*o*) Per Jessel, M.R., in *Ex parte Jones, Re Jones*, 18 Ch. D. 109; 30 L. J. Ch. 673.
(*p*) This provision must have been inserted to prevent collusion, and evasion of the Act, or in order that the Courts should not be bound to inquire into the adequacy of the new consideration.
(*q*) *Belfast Banking Co.* v. *Doherty*, L. R. 4 Ir. C. L. 124.

necessaries. This decision, which seems questionable, was based upon the necessity of preserving intact the title of negotiable securities in the hands of third parties for value. The Court, too, inclined to the opinion that as between the immediate parties to the bill the action would not lie. Under Lord Tenterden's Act (*r*), a verbal ratification of an infant's contract was held inoperative to enable a defendant sued by him to set off validly a debt contracted during infancy by the plaintiff with the defendant (*s*). Under that Act ratification was possible and effectual if carried out in writing; but under the present Act no ratification, whether verbal or in writing, is to be of any efficacy, therefore *a fortiori* an infant's debt or contract cannot now be made the subject of a set-off or counter-claim. A marriage settlement by an infant is only voidable, and is confirmed or ratified by acquiescence in its provisions after majority is attained; so that a marriage settlement is a class of contract not affected by this section (*t*).

New Promise Necessary.—There must be now an actual new promise; and the evidence to support such new promise must be clear and not merely consistent with that which would show a mere ratification of the promise made during infancy (*u*). Thus, where a defendant during infancy became jointly with two others indebted to a firm who brought an action against them after the defendant attained his majority to recover the amount of the debt, and he compromised the action on terms which included (*inter alia*) that he should give certain acceptances, and one of the bills given by the defendant to the plaintiff firm was indorsed by the latter to the plaintiff who was their solicitor in the original action and who took the bill with notice of the circumstances in which it was given, it was held that the transaction or compromise merely amounted either to a promise after age to pay the debt contracted during his infancy, or was a mere ratification after full age of the contract or promise made during his infancy (*x*). But a covenant to repay and an assurance of real property by way of mortgage to secure money lent to an infant may amount to more than a mere ratification

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(*r*) 9 Geo. IV. c. 14.

(*s*) *Rawley* v. *Rawley*, 1 Q. B. D. 460; 45 L. J. Q. B. 675.

(*t*) See *Carter* v. *Silber*, [1892] 2 Ch. 278; *Duncan* v. *Dixon*, 44 Ch. D. 211; 59 L. J. Ch. 437. See *post*, p. 822.

(*u*) See Lindley, L.J., in *Ditcham* v. *Worrall*, 5 C. P. D. 410; 49 L. J. C. P. 688; *Holmes* v. *Brierley*, 59 L. T. 70.

(*x*) *Smith* v. *King*, [1892] 2 Q. B. 543.

of the debt incurred in infancy (*y*). Under the Betting and Loans (Infants) Act, 1892 (*z*), if an infant has contracted a loan which is void in law and has agreed on attaining majority to pay money in respect of such loan, which is not a new advance, such agreement or negotiable security representing such agreement shall be void against all persons.

Liability in Equity.—Since, then, the passing of this Act, any form of ratification of a debt contracted in infancy is powerless to revive it as a good cause of action (*a*). An equitable exception to this has been made in cases where the infant is in appearance and person an adult, and has made express representations that he is of age with intent to deceive the person who trusts him; this is a fraud against which equity will grant relief. The undertaking of an infant does not become a debt, but a liability to pay a sum of money; and as under the Bankruptcy Act, 1914 (*b*), liabilities are provable, the defrauded creditor can, on the majority of the infant, take proceedings in bankruptcy, and prove for the money or amount advanced (*c*). It seems, however, that the personal appearance of the infant is a material element in such a case, for if his looks are clearly those of one not arrived at maturity, the creditor must be held to have dealt with him at his risk, and cannot establish the material fact of deception; and it has been expressly decided that it is not enough that he has by trading held himself out as an adult (*d*).

Contracts Capable of Ratification.—Contracts by which infants may be held bound are such as affect interests in property of a permanent nature with certain obligations attached, to which, as they have derived benefits under their engagements, they ought in fairness to conform, unless they have repudiated their liability within a reasonable and proper time after attaining majority. The infants who enter into them are rather purchasers of a more or less permanent interest than mere contractors. Their position has been thus defined: "They have been treated therefore as persons in a different situation from mere contractors, for then they would have been exempt: but, in truth, they are purchasers who have acquired an interest,

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(*y*) *Re Foulkes, Foulkes* v. *Hughes*, 69 L. T. 183.
(*z*) 4 & 5 Geo. V. c. 59, s. 30 (7).
(*a*) *Ex parte Kibble*, L. R. 10 Ch. App. 373; 44 L. J. Bk. 63.
(*b*) 46 & 47 Vict. c. 52, s. 37.
(*c*) *Ex parte Jones, Re Jones*, 18 Ch. D. 109; 30 L. J. Ch. 673.
(*d*) *Ibid.* See on this point, *Maclean* v. *Dummett*, 22 L. T. 710.

not in a mere chattel, but in a subject of a permanent nature, either by contract . . . or purchase, or devolution from those who have contracted, and with certain obligations attached to it which they were bound to discharge" (*e*). In other words, their liability does not arise on a contract, but on a legal obligation arising out of the circumstances of the transaction. Thus, where an infant defendant in a suit brought to raise portions for the purpose of preventing a sale of certain lands offered to charge the portions on other lands, he was held bound by his offer after attaining his majority, as he had not retracted on attaining twenty-one, and the sale had been delayed (*f*).

Purchase of Land.—Where an infant has purchased an estate, unless he disaffirm the purchase within a reasonable time after attaining twenty-one, he will be taken to have ratified it; a re-sale at majority of property bought during infancy is a confirmation of the purchase (*g*).

If he sell and convey his estate, he must do some act at majority to disaffirm the conveyance, or ratification will be presumed (*h*).

Where an infant makes a lease or takes a lease which is clearly not detrimental to him, he must avoid it within a reasonable and proper time. As a lease is only voidable by him, he may ratify it by continuing to occupy after attaining majority, in which case he will be liable not only for rent due since his majority, but also for arrears accrued before majority (*i*). A surrender of a lease being voidable, will be taken to be ratified unless disaffirmed within a reasonable time of reaching majority. Where he has made a lease, he must likewise avoid it within a reasonable time, or he will be held to have ratified it. A year's acquiescence is sufficient to confirm it (*k*), or any act which recognizes it as binding, *e.g.*, making a mortgage subject to the lease (*l*), or acceptance of rent (*m*). In an old case an infant's saying to the lessee, "God give you joy of it," was held a confirmation (*n*); and it seems any act of recognition, as receiving rent during infancy, is so far a con-

(*e*) Per Parke, B., in *North-Western Railway Co.* v. *M'Michael*, 20 L. J. Ex. 97.
(*f*) *Cecil* v. *Salisbury*, 2 Vern. 224.
(*g*) *Gooch's Case*, L. R. 8 Ch. App. 266; 42 L. J. Ch. 381. See *Whittingham* v. *Murdy*, 60 L. T. 956.
(*h*) *Slater* v. *Brady*, 14 Ir. C. L. 61.
(*i*) *Ketsey's Case*, Cro. Jac. 320; S. C. *Kettle* v. *Elliott*, 1 Roll. Abr. 731; S. C. *Kirton* v. *Elliott*, 2 Buls. 69; *Evelyn* v. *Chichester*, 3 Burr. 1717.
(*k*) *Doe* (*dem. Bromfield*) v. *Smith*, 2 T. R. 436.
(*l*) *Story* v. *Johnson*, 2 Y. & C. Ex. 586.
(*m*) *Smith* v. *Low*, 1 Atk. 489. (*n*) *Anon.*, 4 Leon. 4, c. 15.

firmation that the lessor cannot determine the lease without notice.

Continuing Contracts.—Where the contract entered into by the infant is of a continuing nature, unless he repudiate or disaffirm either before or within a reasonable time after arriving at majority, he will be deemed to have ratified it (*o*). Of such contracts are partnership, the holding of shares, and those of hiring and service.

Partnership.—An infant, it has been seen, may be a partner (*p*), but his contract or agreement in that respect is voidable, but until he has repudiated it it is valid and binding on him, and unless he disaffirm either within age or within a reasonable time after attaining his majority, he will be held to have ratified his contract. Lord Lindley, in the last edition of his work on Partnership (*q*), on the possibility of an adult ratifying his infantile contract of partnership since the Act of 1874, writes: "If, when an infant partner comes of age, he is desirous of retiring from the firm, he should express his determination speedily and unequivocally." It is true that by the Infants' Relief Act, 1874 (*r*), promises made by a person who has attained twenty-one to pay debts contracted before that age cannot be enforced, but a person who retains a share in a partnership or company cannot retain it without its incidental obligations, and the doctrine of "holding out" is itself sufficient to impose liability upon an adult, although he may not long have attained his majority. This is well exemplified in *Goode* v. *Harrison* (*s*). There an infant was a member of a firm, and he was known to be a member. After he had attained twenty-one he did not expressly either affirm or disaffirm the partnership. He was held liable for debts incurred by his co-partners subsequently to that time. In this case of *Goode* v. *Harrison*, Best J., said (*t*): "The infant by holding himself out as a partner contracted a continual obligation, and that obligation remains till he thinks proper to put an end to it. He continued that obligation when he became of age . . . and if he wished to be understood as no longer continuing as

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(*o*) See *North-Western Railway Co.* v. *M'Michael* (*ubi sup.*); *Goode* v. *Harrison*, 5 B. & Ald. 147; *Whittingham* v. *Murdy* (*ubi sup.*).
(*p*) See *ante*, p. 782.
(*q*) P. 84.
(*r*) 37 & 38 Vict. c. 62, s. 2.
(*s*) 5 B. and Ald. 147.
(*t*) P. 159.

a partner, he ought to have notified it to the world." Such notification is obligatory upon him.

Contracts of Hiring.—If an infant enter into a contract of hiring, as, for instance, employing a solicitor or servant, and continue the employment after reaching twenty-one, he will be liable for remuneration due from that time (*u*). In the preceding cases the ground of the infant's liability is that in fairness he ought to confirm the transactions.

Avoidance.—An avoidance is some later act inconsistent with the earlier act and done with the intention direct or indirect to avoid and repudiate it (*x*). This is a right which the law has ever insisted shall be preserved to infants in their dealings with others. It is now settled law than an infant may avoid his voidable contracts with practically few or no exceptions, such as for necessaries and the like, either before or within a reasonable time after coming of age; and what is a reasonable time depends in each case on its circumstances (*y*). Laches is not to be imputed to an infant, for it is a presumption of law that he does not understand his rights, and is not capable of taking advantage of the rules of law, so as to apply them to his advantage. But laches after attaining majority, in not making himself acquainted with the terms of the contract which he seeks to avoid is generally fatal to the efficiency of his repudiation (*z*). So a judgment in law is binding on him unless he gets it set aside on the ground of infancy (*a*), but the Court is not bound to set it aside if it thinks the infant disentitled to the indulgence (*b*).

Matters in fait.—Matters *in fait* may be avoided either within age or within a reasonable time after attaining twenty-one. An infant's final and conclusive election cannot be made till he reaches majority (*c*); for if he avoid within age, his avoidance may not be conclusive, for on reaching majority he may disaffirm his avoidance (*d*); but where it would be more to his prejudice to affirm than to avoid, it would be necessary to produce clear and unmistakable evidence of his having revived the contract (*e*). On the other hand, where the act done by the

(*u*) *Waldo* v. *Waldo*, 1 F. & F. 173; *Guy* v. *Burgess*, 1 Smith, 117.
(*x*) See *Inman* v. *Inman*, L. R. 15 Eq. 260.
(*y*) *Edwards* v. *Carter*, [1893] App. Cas. 360; 63 L. J. Ch. 100.
(*z*) *Ibid.* (*a*) *Henry* v. *Archibald*, I. R. 5 Eq. 559.
(*b*) *Wright* v. *Hunter*, 1 L. J. K. B. (o.s.) 248.
(*c*) *North-Western Railway Co.* v. *M'Michael*, 20 L. J. Ex. 97.
(*d*) *Zouch* v. *Parsons*, 3 Burr. 1794; *Slator* v. *Trimble*, 14 Ir. C. L. 342.
(*e*) *Baker's Case*, L. R. 7 Ch. App. 115; 41 L. J. Ch. 275.

infant is complete and past, like the conveyance of an estate executed by him (*f*), or where his contract is of a continuing nature, such as a partnership or the holding of shares, he must as clearly and unequivocally demonstrate his repudiation of liability (*g*). Thus, if an infant shareholder does not repudiate his shares either whilst he is an infant or within a reasonable time after he attains twenty-one, and in an unmistakable manner, he will be liable to pay calls, or to be put upon the list of contributories (*h*), unless the company was in process of being wound up at the time he became possessed of or interested in the shares (*i*). But there is an important difference between the acquiescence of a shareholder and that of a contributory; "if a man allows his name to remain on the register of shareholders for a length of time, that may raise an equity against him to have kept it there, but I cannot see that his leaving it on the list of contributions raises any similar equity against him. His allowing it to remain there is, indeed, capable of being used as evidence against him that it was rightly placed there" (*k*). So, as a partner, unless he disaffirm within a reasonable time after attaining twenty-one, he will be liable for the partnership debts incurred after he has reached majority (*l*). Again, in a contract of service, the infant must avoid his contract in a proper manner, and not merely by implication; and the running away of an apprentice after attaining twenty-one is not a proper avoidance of the contract of service (*m*). If an infant enters into a contract of service which is beneficial for him in which he binds himself not to do a particular act on the termination of the service, though on reaching majority he may avoid his contract, yet he will be restrained from committing a breach of that part of the contract which binds him not to do the particular act (*n*); and if he continues in the service some time after attaining majority an entirely new contract as an adult will be inferred (*o*).

(*f*) *Slator* v. *Brady*, 14 Ir. C. L. 61.

(*g*) *Goode* v. *Harrison*, 5 B. & Ald. 147; *Cork and Bandon Railway Co.* v. *Cazenove*, 10 Q. B. 935; *Dublin and Wicklow Railway Co.* v. *Black*, 8 Ex. 181; 22 L. J. Ex. 94; *Baker's Case (ubi sup.)*.; *Whittingham* v. *Murdy*, 60 L. T. 956.

(*h*) Lind. Comp. 810, and the cases there cited.

(*i*) *Shrapnell's Case*, cited in Lind. Comp. 810.

(*k*) Per Turner, L.J., in *Shewell's Case*, L. R. 2 Ch. App. 387.

(*l*) *Goode* v. *Harrison (ubi sup.)*.

(*m*) See *Rex* v. *Evered*, 16 East, 27; *Gray* v. *Cookson*, 16 East, 13.

(*n*) *Fellows* v. *Wood*, 59 L. T. 513. See *Cornwall* v. *Hawkins*, 41 L. J. Ch. 435, and *Evans* v. *Ware*, [1892] 3 Ch. 502.

(*o*) *Brown* v. *Harper*, 68 L. T. 488.

The privilege of avoiding his contracts is one which is personal to the infant and his representatives (*p*); therefore, though the contract be voidable, yet it shall bind the person of full age.

Effect of Avoidance.—If an infant avoids a contract, and has derived no benefit from it, he is entitled to recover back any money paid by him in part performance of it, or if there has been a total failure of consideration, but not otherwise (*q*), and there can be a *restitutio in integrum* on his part (*r*); and there may be a failure of consideration as to the principal agreement, though the infant may have received a benefit under some collateral stipulation (*s*); but he cannot do so unless he restore the party contracting with him to the same position as if there had been no contract: accordingly, if an infant take a lease and occupy, he cannot on avoiding the lease recover the premium paid for it (*t*); or if he uses and consumes things for which he has paid he cannot under the Infants' Relief Act, 1874, recover back the money he has paid for them, though the contract in respect of which the money was paid be declared void and set aside (*u*); or if he becomes and acts as a partner, he cannot recover the money paid for the partnership (*x*); again, if he insure his life, he cannot recover the premiums (*y*). If he buy land or goods and pay cash for them, and he avoids the contract after attaining majority his avoidance would revest the land or goods in the vendor (*z*). This proposition assumes that he has done nothing to the land so as to affect its value, or in the case of a lease that he has not occupied the premises for any length of time (*a*). Of course, as in the case of adults, where there is a total failure of consideration, and the other party to the contract can be restored to his original position, the

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(*p*) *Keane* v. *Boycott*, 2 H. Bl. 511. "In short, the disabilities of an infant are intended by law for his own protection, and not for the protection of the rights of third persons; and his acts may therefore, in many cases, be binding upon him although the persons under whose guardianship, natural or positive, he then is, do not assent to them." Per Story, C.J., in *United States* v. *Bainbridge*, 1 Mason, 83.

(*q*) *Steinberg* v. *Scala (Leeds) Lim.*, [1923] 2 Ch. 452; 92 L. J. K. B. 944.

(*r*) *Corpe* v. *Overton*, 10 Bing. 252; *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.*, [1894] 3 Ch. 589; 63 L. J. Ch. 795.

(*s*) *Everett* v. *Wilkins*, 29 L. T. 846.

(*t*) *Holmes* v. *Blogg*, 8 Taunt. 508.

(*u*) *Valentini* v. *Canali*, 24 Q. B. D. 166; 59 L. J. Q. B. 74.

(*x*) *Ex parte Taylor*, 26 L. T. (o.s.) 266.

(*y*) Buny. Life Ass. 346.

(*z*) See *North-Western Railway Co.* v. *M'Michael*, 20 L. J. Ex. 97.

(*a*) See *Holmes* v. *Blogg*, 8 Taunt. 508.

infant may recover whatever he may have paid (*b*). So if he sell land and is not paid the purchase-money he can recover it; or if he sells goods on credit he can avoid the contract and recover the goods (*c*). The right to recover goods is reciprocal, and the goods (or if he has sold them or raised money upon them the money so obtained) may be recovered by a person who has sold to an infant, though the infant is not bound under the contract to pay the agreed purchase price (*d*).

(*b*) *Corpe* v. *Overton*, 10 Bing. 252.
(*c*) *Austen* v. *Jervas*, Hobbes, 77.
(*d*) *Stocks* v. *Wilson*, [1913] 2 K. B. 235; 82 L. J. K. B. 598. Explained in *R. Leslie, Lim.* v. *Sheill*, [1914] 3 K. B. 607; 83 L. J. K. B. 1145.

CHAPTER IV.

MARRIAGE SETTLEMENTS OF INFANTS.

SECTION I.

Settlements not under Infant Settlements Act, 1855 (*a*).

THE general incapacity of an infant to contract is the foundation of the rule that an infant, male or female, cannot irrevocably under all circumstances bind his or her property of whatsoever description by a marriage settlement; and the marriage agreement, even if beneficial, may be set aside on repudiation within a reasonable time after attaining majority, when he or she may sell and dispose of the property intended to be affected by the agreement (*b*). It was, however, in earlier times thought that because the infants could contract validly to marry, therefore contracts by them dealing with their property to be affected by marriage would also be valid. Where a settlement is for the benefit of the infant it is not void but voidable, and if sought to be repudiated, repudiation must take place within a reasonable time after attaining majority, and what is a reasonable time depends upon the facts of each case (*c*). But the English doctrine that the voidable contract of an infant becomes binding if not repudiated within a reasonable time has no application where the wife by her marriage has acquired a foreign domicil, and the law of that domicil permits revocation by husband and wife of their marriage contract, which right can neither be waived nor lost by lapse of time (*d*). The Court of Chancery never has had inherent jurisdiction to compel an infant, whether a ward of Court or not, to make a settlement of his or her property on marriage (*e*). An infant cannot make a binding settlement

(*a*) 18 & 19 Vict. c. 43.
(*b*) See *Edwards* v. *Carter*, [1893] App. Cas. 360; 63 L. J. Ch. 100.
(*c*) *Ibid.*
(*d*) *Viditz* v. *O'Hagan*, [1900] 2 Ch. 87; 69 L. J. Ch. 507.
(*e*) *Field* v. *Moore*, 24 L. J. Ch. 161; *Re Leigh, Leigh* v. *Leigh*, 40 Ch. D. 290; 58 L. J. Ch. 306; *Seaton* v. *Seaton*, 13 App. Cas. 61; 57 L. J. Ch. 661

of his or her property in consideration of a third person making a competent settlement on him or her (*f*); and the consent of parents or guardians to the marriage, and their approbation of the settlement confers no binding force on it (*g*). The majority of the authorities are connected with the cases of female minors, and so they will be considered first.

Female Infant, Male Adult.—The power of making a valid settlement depended upon the nature of the property to be settled; and the canon by which the validity of the settlement could be tested was the interest of the husband in the property of the wife. Where the husband had an absolute interest by operation of law in the property intended to be settled, the settlement of such property was binding on both, for the settlement was in effect his settlement and not hers (*h*); where, on the contrary, he had no interest in the property of his wife, the latter, on attaining her majority, could set the arrangement aside.

Realty.—A female infant could not make a binding settlement of her real estate, because her husband by law took only a limited interest in her real estate (*i*). If she survive her husband her power over her realty is the same as if no settlement had ever been made.

But there has not been a consensus of opinion on this point. Lords Macclesfield (*k*) and Hardwicke (*l*) held that she could make a binding settlement of her realty. Lord Nottingham was of opinion that she could not contract to bind her real estate (*m*); this was followed by Lord Thurlow, who expressly decided that an infant could not enter into a binding marriage settlement, and if he did nothing on attaining majority to affirm his contract, he could set it aside (*n*). This reasoning was adopted by Lord Eldon, who held that the principle of infantile incapacity applied equally to males and females (*o*). It has

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(*f*) *Durnford* v. *Lane*, 1 Bro. C. C. 106.

(*g*) *Clough* v. *Clough*, 5 Ves. 717.

(*h*) Per Leach, M.R., in *Simson* v. *Jones*, 2 Russ. & Myl. 365, 376. See *Stevens* v. *Trevor-Garrick*, [1893] 2 Ch. 307; 62 L. J. Ch. 660; and *Buckland* v. *Buckland*, [1900] 2 Ch. 534; *Re Crook's Settlement*, *Re Glasier's Settlement*, *Crook* v. *Preston*, [1923] 2 Ch. 339; 92 L. J. Ch. 495.

(*i*) *Durnford* v. *Lane* (*ubi sup.*); *Milner* v. *Lord Harewood*, 18 Ves. 259; *Stamper* v. *Barker*, 5 Madd. 164; *Pimm* v. *Insall*, 7 Ha. 193; *Field* v. *Moore* (*ubi sup.*). See Peach. Sett. 26-28.

(*k*) In *Cannel* v. *Buckle*, 2 P. Wms. 243.

(*l*) In *Harvey* v. *Ashley*, 3 Atk. 607.

(*m*) *Salsbury* v. *Bagott*, 2 Swanst. 603.

(*n*) *Williams* v. *Williams*, 1 Bro. C. C. 152.

(*o*) *Caruthers* v. *Caruthers*, 4 Bro. C. C. 500. See *Milner* v. *Lord Harewood*, 18 Ves. 259.

been held that an agreement by the wife disposing of her chattels real was binding, because the husband had complete control over his wife's leaseholds (*p*). The wife was, however, practically bound during her coverture, because her husband's concurrence was necessary to the conveyance of her realty, and he was not permitted to do or concur in any act calculated to defeat the uses of the settlement (*q*). It has also been held that the wife will be bound if she has been guilty of concealment and fraud (*r*). She will also be bound by a representation which is inaccurate, though made in good faith, on which the sanction of the Court was obtained under the Infant Settlements Act, 1855 (*s*).

Personalty.—The general personal estate of a female infant was bound by the settlement, because her husband took an absolute interest in such property, and the settlement was deemed practically to be his (*t*). Her choses in action reduced into possession during the coverture were also bound (*u*); but such as were not reduced (*x*), or her reversionary interests not becoming interests in possession during coverture, were not so bound (*y*). A settlement by her operates as a severance of the joint-tenancy of any property settled by her which she held jointly with others (*z*). Property settled to the wife's separate use was not bound, for the reason that the husband took no interest in it (*a*).

Female Infant not Bound by Settlement.—It was at first thought that the effect of the Married Women's Property Act, 1882, was to render a settlement of personalty as well as realty not authorized by the Court of Chancery, not binding upon a female infant; but the Courts held that where the husband agreed to the infant wife's settlement of her non-separate property, or covenanted to settle such property, section 19 of the Act preserved the old state of the law, and that the infant wife was bound (*b*).

(*p*) *Trollope* v. *Linton*, 1 Sim. & St. 477.
(*q*) *Durnford* v. *Lane*, 1 Bro. C. C. 106; *Pimm* v. *Insall*, 7 Ha. 193.
(*r*) *Sharpe* v. *Foy*, L. R. 4 Ch. App. 35.
(*s*) *Mills* v. *Fox*, 37 Ch. D. 153; 57 L. J. Ch. 56.
(*t*) *Simson* v. *Jones*, 2 R. & M. 365.
(*u*) *Rawlins* v. *Birkett*, 25 L. J. Ch. 837.
(*x*) *Borton* v. *Borton*, 16 Sim. 552.
(*y*) *Cuningham* v. *Antrobus*, 16 Sim. 436; *Field* v. *Moore*, 24 L. J. Ch. 161.
(*z*) *Burnaby* v. *Equitable Reversionary Interest Society*, 28 Ch. D. 416; 54 L. J. Ch. 466. But see section 36 of the Law of Property Act, 1925.
(*a*) *Simson* v. *Jones* (*ubi sup.*).
(*b*) *Hancock* v. *Hancock*, 38 Ch. D. 78; 57 L. J. Ch. 396; *Stevens* v. *Trevor-Garrick*, [1893] 2 Ch. 307; 62 L. J. Ch. 660; *Buckland* v. *Buckland*, [1900] 2 Ch. 534.

Now, however, by the amending Act passed in 1907 (*c*), it is provided, notwithstanding section 19 of the Married Women's Property Act, 1882, that a settlement or agreement for a settlement made after December 31, 1907, by the husband or intended husband, whether before or after marriage, respecting the property of any woman he may marry or have married, shall not be valid unless it is executed by her if she is of full age, or confirmed by her after she attains full age. But if she dies an infant, any covenant or disposition by her husband contained in the settlement or agreement shall bind or pass any interest in any property of hers to which he may become entitled on her death and which he could have bound or disposed of if the amending Act had not been passed. This provision is not to render invalid any settlement or agreement made or to be made under the provisions of the Infant Settlements Act, 1885 (*d*). The cases in which the wife is bound, therefore, may be taken now to be those only in which she was of full age at the time of executing the marriage settlement (*e*), or where she has, after attaining full age, either executed the settlement or confirmed it; and as the effect of section 19 of the Married Women's Property Act, 1882, is to render section 2 as though it were non-existent, the wife's reversion falling into possession during the coverture belongs to the husband in right of his wife and he becomes bound by his covenant to settle the property (*f*).

Confirmation.—The wife may be bound either by her execution of the settlement or agreement, or by her confirmation of it after attaining full age under the Act of 1907. The fact that she might be bound by her confirmation had previously been recognized and accepted by the Courts (*g*). As to what is sufficient to amount to confirmation the mere appointment of a new trustee by a married woman on attaining her majority is not necessarily an expression of her intention to confirm the settlement (*h*), but it is not necessary that she should do any particular act to confirm it (*i*). If the confirmation ought to

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(*c*) Married Women's Property Act, 1907. (*d*) Sect. 2.

(*e*) *Re Crook's Settlement, Re Glasier's Settlement, Crook* v. *Preston*, [1923] 2 Ch. 339; 92 L. J. Ch. 495.

(*f*) *Ibid.*

(*g*) *Merryweather* v. *Jones*, 4 Giff. 509; *Barrow* v. *Barrow*, 4 K. & J. 409; *Davies* v. *Davies*, L. R. 9 Eq. 468; 39 L. J. Ch. 342; *Willoughby* v. *Middleton*, 2 J. & H. 344; *White* v. *Cox*, 2 Ch. D. 387; 45 L. J. Ch. 685; *Smith* v. *Lucas*, 18 Ch. D. 531.

(*h*) *Haywood* v. *Tidy*, 63 L. T. 679.

(*i*) See *Burnaby* v. *Equitable Reversionary Interest Society*, 28 Ch. D. 416; 54 L. J. Ch. 466.

be by deed acknowledged, then there ought to be such deed (*k*); and the property she professes to bind by her confirmation must be such as she is capable of disposing of (*l*).

Election.—The wife may, after attaining twenty-one, and during the coverture, elect whether the covenant shall be binding on her separate estate or not, such right of election being a necessary consequence of a married woman's power to dispose without her husband's consent of property settled to her separate use (*m*), a right now fully recognized by the Married Women's Property Act, 1907 (*n*). If the settled property consists of a fund in Court it will not be transferred to her trustees without her consent on attaining majority (*o*). A married woman on majority may confirm the settlement as to a particular fund without confirming it as a whole (*p*); though in the absence of evidence to the contrary, confirmation of part would be deemed confirmation of the whole (*q*). Where she attains majority, and evinces her intention of confirming the settlement, it will be recognized as binding on her; and if she become of unsound mind (though not so found by inquisition) before electing, the Court will elect on her behalf when it appears to be for her benefit (*r*). Where a person takes a benefit under an instrument, he or she can accept the benefit under it, but not without at the same time conforming to all its provisions and renouncing every right inconsistent with them; in other words, such person cannot approbate and reprobate the instrument at the same time. Where, then, any person chooses to defeat a settlement he or she must make compensation to those who are disappointed by her choice. This rule of law has been held applicable to a woman who, marrying as an infant with property settled on her, on attaining majority has elected to disaffirm the settlement. Thus, it has been held that a wife could not insist upon the benefit of a settlement made during her infancy so far as regards property effectually bound by the contract of her husband, and at the same time repudiate the settlement as to property not capable of being so bound, but

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(*k*) *Field* v. *Moore* (*ubi sup.*).
(*l*) *Smith* v. *Lucas* (*ubi sup.*).
(*m*) *Willoughby* v. *Middleton* (*ubi sup.*); *Smith* v. *Lucas* (*ubi sup.*).
(*n*) 7 Edw. VII. c. 18, s. 2.
(*o*) *Day* v. *Day*, 11 Beav. 35.
(*p*) See *Seaton* v. *Seaton*, 13 App. Cas. 61; 57 L. J. Ch. 661.
(*q*) *Davies* v. *Davies*, L. R. 9 Eq. 468; 39 L. J. Ch. 342; Simp. Inf. 35.
(*r*) *Wilder* v. *Pigott*, 22 Ch. D. 263; 52 L. J. Ch. 263. See also *Jones* v. *Lloyd*, L. R. 18 Eq. 265.

had to elect whether she would take under or against the settlement (*s*).

Again, a married woman has been put to her election to take under or against the settlement under the following circumstances: She married as an infant, and joined in a post-nuptial settlement, executed after her coming of age, in which her husband's property, property settled by her father on her, and reversionary property of her own (which she could not have properly bound) were all settled on the trusts of the marriage settlement; she became discovert before the reversion fell into possession, and claimed the reversionary property independently of the settlement (*t*). This rule will continue to be applied in all cases not affected by the Act of 1882; but where that Act will apply, the question of election would not seem to arise, for the husband's covenant cannot bind any property of his wife, for he has no interest in it; so that on attaining majority she will be able to repudiate the covenant made by her. It is a condition precedent that the infant should on attaining full age be competent to give up by way of compensation the provision intended for him or her under the settlement (*u*).

This doctrine of election is founded on a presumption of a general intention that every part of an instrument shall take effect; but the presumption of such general intention may be rebutted by an inconsistent particular intention appearing in the instrument; and so far as married women infants are concerned restraint against anticipation is such inconsistent intention (*x*); and this intention is not affected by the fact that the married woman has subsequently become discovert (*y*). Thus, where a married woman, as an infant, was possessed of a fund which she was restrained from anticipating by the instrument of settlement, and by the same instrument entered into a covenant to settle after-acquired property, which covenant she disaffirmed after reaching majority, she was held not bound to elect whether she should take under or against the instrument of settlement, but entitled to keep both the settled sum and any other sums which might otherwise have been affected by her covenant (*z*). This

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(*s*) *Willoughby* v. *Middleton*, 2 J. & H. 344.

(*t*) *Codrington* v. *Codrington*, L. R. 7 H. L. 854; 45 L. J. Ch. 660. See *ante*, p. 377.

(*u*) 6 Byth. & Jarm. (4th edit.) 148.

(*x*) *Re Vardon's Trusts*, 31 Ch. D. 275; 55 L. J. Ch. 259; *Hamilton* v. *Hamilton*, [1892] 1 Ch. 396; 61 L. J. Ch. 220; *Haynes* v. *Foster*, [1901] 1 Ch. 361; 70 L. J. Ch. 302.

(*y*) *Haynes* v. *Foster* (*ubi sup.*).

(*z*) *Re Vardon's Trusts* (*ubi sup.*).

question has given rise to a considerable conflict of opinion, and a married woman has been held bound to her election under such circumstances as above mentioned (*a*). But the opinion given in the text is now settled law (*b*). Where a married woman elects to repudiate the settlement she must do so within a reasonable time after attaining majority (*c*). The election cannot be made by an infant while under disability (*d*).

Difference between Election and Confirmation.—Election is different from confirmation, for though an election to abide by a settlement is of course a confirmation of it, yet a confirmation need not raise any question of election, so that part of a settlement only may be confirmed; but an election to abide by part is an election to abide by the whole (*e*).

Summary.—A covenant by a female infant on her marriage with a male adult did not bind her realty, because her husband took but a limited interest in the property; but her interest by survivorship in her chattels real was bound. The general personal estate of a female infant was bound by a settlement made on her marriage, because it became the absolute property of the husband, and the settlement was in effect his settlement. This included choses in action reduced into possession during coverture, but not those not reduced into possession. Her separate property was not bound, because her husband took no interest in it. On attaining her majority a married woman might be bound by a settlement made by her during infancy, where she acquiesced in it, or confirmed it, or elected to take under it. The effect of the Married Women's Property Acts, 1882 and 1907, is to render every settlement of realty or personalty not made with the sanction of the Court of Chancery by a female infant voidable at her election on attaining the age of twenty-one.

Male Infant, Female Adult.—There is no distinction to be made between male and female infants as regards their powers of making binding settlements of their property. An ante-nuptial agreement by a husband to settle his wife's unsettled

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(*a*) See *Willoughby* v. *Middleton*, 2 J. & H. 344; *Codrington* v. *Codrington*, L. R. 7 H. L. 854; 45 L. J. Ch. 660; *Re Queade's Trusts*, 54 L. J. Ch. 786.

(*b*) *Re Wheatley*, *Smith* v. *Spence*, 27 Ch. D. 606; 54 L. J. Ch. 201; *Re Vardon's Trusts* (*ubi sup.*), overruling *Re Queade's Trusts* (*ubi sup.*); and see judgment of Jessel, M.R., in *Smith* v. *Lucas*, 18 Ch. D. 531.

(*c*) *Edwards* v. *Carter*, [1893] App. Cas. 360; 63 L. J. Ch. 100.

(*d*) *Milner* v. *Lord Harewood*, 18 Ves. 259.

(*e*) *Milner* v. *Lord Harewood* (*ubi sup.*); Simp. Inf. 36.

property was held void as being prejudicial to his interests (*f*). A male infant cannot more effectually covenant to settle his real or personal property than a female (*g*); though it seems that if he has been guilty of fraud and misrepresentation by which his wife has been misled, he will be held bound by his settlement of his personal property (*h*).

Where the infant wishes to repudiate a settlement made on his marriage, he must disaffirm the contract within a reasonable time after attaining majority, and must be treated as knowing the contents of the deed, whether he knew them or not (*i*). It was decided in one case that the time for repudiation was on the property falling into possession and becoming payable to the infant or the trustees (*k*), but in a later case the Court of Appeal held otherwise, and decided that the time must be calculated from the time of attaining majority, and further that an infant cannot plead ignorance of the right to repudiate as an excuse for delay (*l*). Where he elects to defeat the settlement he must make compensation out of the interest derived through or out of the settlement.

Husband and Wife Infants.—Where both husband and wife are infants their respective covenants to settle their property, real or personal, are absolutely ineffectual to bind them. Where the infant is a ward of Court, the sanction of the Court must be obtained to the marriage, which will not be granted unless it appears that the marriage is suitable, and the proposed settlement proper.

SECTION II.

Settlements under Infant Settlements Act, 1855.

It was once thought that the concurrence of the parents or guardians rendered the covenants of infants binding (*m*), and that the Court of Chancery might so contract on behalf of its

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(*f*) *Kingsman* v. *Kingsman*, 6 Q. B. D. 122; 50 L. J. Q. B. 81.

(*g*) See *Blood* v. *Branfill*, cited by Turner, L.J., in *Field* v. *Moore*, 7 De G. M. & G. 711; 24 L. J. Ch. 161; *Honywood* v. *Honywood*, 20 Beav. 451; *Derbishire* v. *Home*, 5 De G. & Sm. 702. In *Slocombe* v. *Glubb* (2 Bro. C. C. 545), the infant husband was held bound by his wife's covenant, because as husband he had to answer for her ante-nuptial contracts; but in view of recent legislation, that ground cannot be said any longer to exist.

(*h*) See *Nelson* v. *Stocker*, 4 De G. & J. 458; 28 L. J. Ch. 760.

(*i*) *Edwards* v. *Carter*, [1893] App. Cas. 360; 63 L. J. Ch. 100.

(*k*) *Re Jones*, *Farrington* v. *Foster*, [1893] 2 Ch. 461; 62 L. J. Ch. 996.

(*l*) *Carnell* v. *Harrison*, [1916] 1 Ch. 328; 85 L. J. Ch. 321.

(*m*) See *Harvey* v. *Ashley*, 3 Atk. 612; *Ainslie* v. *Medlycott*, 9 Ves. 13.

infant wards as to bind them (*n*). But it is now settled that the former proposition is no longer law (*o*), and that the Court of Chancery has no authority to give an infant a power of alienation even for his own benefit (*p*); and that apart from its statutory powers the Court cannot intervene to give to the act of an infant any further operation upon property, or other legal result, than it would have independently of such intervention (*q*). In order to obviate the inconveniences and disadvantages arising from the incapacity of persons marrying during their infancy to make binding settlements of their property, in 1855 the following Act was passed, entitled, "An Act to enable Infants, with the Approbation of the Court of Chancery, to make Binding Settlements of their Real and Personal Estate on Marriage" (*r*).

"Sect. 1. It shall be lawful for every infant, upon (*s*) or in contemplation of his or her marriage, with the sanction of the Court of Chancery, to make a valid and binding settlement or contract for a settlement of all or any part of his or her property, or property over which he or she has any power of appointment, whether real or personal, and whether in possession, reversion, remainder, or expectancy; and every conveyance, appointment, and assignment of such real or personal estate, or contract to make a conveyance, appointment, or assignment thereof, executed by such infant, with the approbation of the said Court, for the purpose of giving effect to such settlement, shall be as valid and effectual as if the person executing the same were of the full age of twenty-one years: Provided always, that this enactment shall not extend to powers of which it is expressly declared that they shall not be exercised by an infant.

"Sect. 2. Provided always, that in case any appointment under a power of appointment, or any disentailing assurance, shall have been executed by any infant tenant in tail under the provisions of this Act, and such infant shall afterwards die under age, such appointment or disentailing assurance shall thereupon become absolutely void.

"Sect. 3. The sanction of the Court of Chancery to any such settlement or contract for a settlement may be given upon petition presented by the infant or his or her guardian in a summary way, without the institution of a suit; and if there be no guardian, the Court may require a guardian to be appointed or not, as it shall think fit; and the Court also may, if it shall think fit, require that any persons interested or

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(*n*) See *Drury* v. *Drury*, 2 Ed. 39.

(*o*) *Simson* v. *Jones*, 2 Russ. & Myl. 365.

(*p*) *Hastings* v. *Orde*, 11 Sim. 205.

(*q*) Per Turner, L.J., in *Field* v. *Moore*, 7 De G. M. & G. 711; 24 L. J. Ch. 161; *Re Leigh*, *Leigh* v. *Leigh*, 40 Ch. D. 290; 58 L. J. Ch. 306; *Seaton* v. *Seaton*, 13 App. Cas. 61; 57 L. J. Ch. 661.

(*r*) 18 & 19 Vict. c. 43, extended to Ireland by 23 & 24 Vict. c. 83.

(*s*) In *Re Sampson* v. *Wall*, 25 Ch. D. 492; 53 L. J. Ch. 457, Lord Selborne held that "upon" was equivalent to "upon occasion of," and would therefore give the Court jurisdiction over settlements to be made after the marriage of the infant settlor, but after the more recent cases of *Re Leigh*, *Leigh* v. *Leigh* (*ubi sup.*), *Seaton* v. *Seaton* (*ubi sup.*), in the House of Lords, and *Re A. B.* (*an Infant*), [1914] W. N. 140, this construction cannot easily be maintained.

appearing to be interested in the property should be served with notice of such petition.

"Sect. 4. Provided always, that nothing in this Act contained shall apply to any male infant under the age of twenty years, or to any female infant under the age of seventeen years."

An application under this Act does not constitute the infant a ward of Court, nor does the Court inquire into the propriety of the marriage, but only the propriety of the settlement, though, of course, "what in each case may be a proper settlement must sometimes lead to an inquiry as to all the circumstances connected with the marriage" (*t*).

Petitions under the Act. Upon applications to obtain the sanction of the Court to infants making settlements on marriage, under the Act of 18 & 19 Vict. c. 43, evidence is to be produced to show:—

1. The age of the infant.
2. Whether the infant has any parents or guardians.
3. With whom, or under whose care, the infant is living, and if the infant has no parents or guardians, what near relations the infant has.
4. The rank and position in life of the infant and parents.
5. What the infant's property and fortune consist of.
6. The age, rank, and position in life of the person to whom the infant is about to be married.
7. What property, fortune, and income such person has.
8. The fitness of the proposed trustees, and their consent to act.

The proposals for the settlement of the property of the infant, and of the person to whom such infant is to be proposed to be married, are to be submitted to the judge.

The Court usually confines itself to keeping settlements within the limits of what it considers expedient and suitable to the circumstances, and to deciding in case of a difference of opinion (*u*). The settlement is that of the infant and not that of the Court (*x*). The Act enables an infant in exercising a general power of appointment for the purpose of making a settlement of his property on marriage to make an absolute

(*t*) *Re Dalton*, 4 W. R. 761. See also *Re Strong*, 26 L. J. Ch. 64.

(*u*) 3 Dav. Prec. Part I. p. 195. In an Irish case it was held that the Act was intended to enable infants to make binding settlements, and not to defeat a settlement by appointing away part of the settled property, *Re Armit's Trusts*, Ir. Rep. 5 Eq. 352.

(*x*) *Seaton* v. *Seaton*, 13 App. Cas. 61; 57 L. J. Ch. 661.

appointment, so that on the failure of the limitations of the settlement the appointed property will become his own (*y*).

It has been decided that the statute applies to post-nuptial settlements (*z*), and renders valid a post-nuptial settlement of an infant's estate made with the approbation of the Court of Chancery, where the infant is a ward of Court (*a*); and the sanction of the Court may be given where no petition under the Act has been filed (*b*). It was also decided by the Court of Appeal that the Court has power to sanction a binding settlement of the property of an infant, not being a ward of Court, even after his marriage (*c*). This decision was followed by Chitty, J., in the case of a young girl who married before she was seventeen; and after attaining seventeen applied to the Court to make a binding settlement of her property (*d*). This power, if it exists at all, enables the Court to make a settlement binding upon infants which otherwise would have been voidable at their election. But the House of Lords has laid it down that the Court has no power to compel one of its wards to make a settlement of his property *in invitum*, even though he has been in contempt for marrying without leave (*e*). After the expression of opinion of the House of Lords in *Seaton* v. *Seaton*, a considerable doubt of the accuracy of the judgment of the Court of Appeal in *Re Sampson and Wall* must result.

An infant's marriage settlement is voidable and not void, and is not within the Infants' Relief Act, 1874 (*f*).

(*y*) *Re Scott, Scott* v. *Hanbury*, [1891] 1 Ch. 298; 60 L. J. Ch. 461, and see *Re D'Angibau, Andrews* v. *Andrews*, 15 Ch. D. 228; 49 L. J. Ch. 756.

(*z*) *Re A.B., an Infant*, [1914] W. N. 140.

(*a*) *Powell* v. *Oakley*, 34 Beav. 575; *Re Sampson and Wall*, 25 Ch. D. 482; 53 L. J. Ch. 457.

(*b*) See *Re Sampson and Wall* (*ubi sup.*).

(*c*) *Ibid.*

(*d*) *Re Phillips* (*an Infant*), 34 Ch. D. 467; 56 L. J. Ch. 337.

(*e*) *Seaton* v. *Seaton*, 13 App. Cas. 61; 57 L. J. Ch. 661; and see *Re Leigh, Leigh* v. *Leigh*, 40 Ch. D. 290; 58 L. J. Ch. 306.

(*f*) 37 & 38 Vict. c. 62. *Duncan* v. *Dixon*, 44 Ch. D. 211; 59 L. J. Ch. 437; *Edwards* v. *Carter*, [1893] A. C. 360; 63 L. J. Ch. 100.

CHAPTER V.

WARDS OF COURT.

Section 1.

How Ward of Court Constituted.

By the Judicature Act, 1873 (*a*), wardship of infants is exclusively assigned to the Chancery Division of the High Court. The power of the Court is exercisable over not only children resident in England, but over the children of British subjects, though born and residing abroad (*b*). The Court of County Palatine has concurrent jurisdiction with the High Court to appoint guardians, but with a general right of interference by the Chancery Division (*c*).

Where a suit is instituted in relation to the estate or person of an infant and for his benefit, or for the administration of property in which he is interested, the infant, whether he be plaintiff or defendant, becomes a ward of Court. In this character he is considered to be under the particular care of the Court; and he is equally entitled to its protection, whether he is under the immediate tutelage of a parent, a statutory or common law guardian, or a guardian appointed by the Court; for the Court does not assume to itself the actual guardianship of infants (*d*). Leave to apply for directions for the appointment of a guardian and for maintenance, and for directions as to education, &c., are no longer inserted in the decree, for application for such matters can be made at chambers without leave. If the infant is a party to the suit, the application is made by an ordinary summons; if he is not a party, the first application is made by a summons in the form used for proceedings originating at chambers, which is instituted in the matter of the infant by his next friend, and in the suit, but

(*a*) 36 & 37 Vict. c. 66, s. 34, sub-s. 3.
(*b*) *Hope* v. *Hope*, 26 L. J. Ch. 417.
(*c*) *Re Alison's Trusts*, 8 Ch. D. 1; 47 L. J. Ch. 755.
(*d*) Macph. Inf. 103.

subsequent applications in the same matter and suit are made by an ordinary summons (*e*). Any person may commence proceedings on behalf of infants; though if the proceedings have been improperly commenced, the originator will run the risk of having the suit dismissed, and being visited with costs (*f*).

An infant is also constituted a ward of Court by an order in Chancery appointing a guardian (*g*); by payment of money in which the infant is interested into Court, under the Trustee Act, 1925 (*h*); by an order made for payment of part of such fund for maintenance (*i*); by payment into Court of moneys to the separate account of an infant in an administration suit to which the infant was not a party (*k*) (but it has been held that this does not apply where the infant was an alien with a foreign domicil; or at any rate that the Court has a discretion whether the foreign infant shall be so constituted one of its wards (*l*)); or by an order at chambers for the maintenance of an infant without suit (*m*). An opinion has also been expressed that an actual order of the Court appointing a guardian is not necessary to constitute an infant a ward of Court; but that if a summons for the appointment of a guardian is taken out, and no order is made upon it, but an arrangement as to access to the infant is made, such proceedings are sufficient to constitute the infant a ward of Court (*n*).

But payment into Court of money under the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18) (*o*), and the mere bringing an action in Chancery against an infant, except for the above purposes, does not make him a ward of Court (*p*). And it seems that the carrying of a fund to the separate account of an infant in an action to which he is not a party is insufficient to constitute him a ward of Court, and it certainly is not where the infants are aliens and resident out of the jurisdiction (*q*).

Infant British Subject Abroad.—An infant British subject

(*e*) 2 Dan. Ch. Pr. 1116.
(*f*) *Ibid.* 1112. See *post*, chap. vii.
(*g*) *Stuart* v. *Marquis of Bute*, 9 H. L. Cas. 440.
(*h*) 15 Geo. V. c. 19, s. 63.
(*i*) *Re Hodge's Trusts*, 3 Jur. (N.S.) 860; *Re Benand*, 16 W. R. 538; *Re Lloyd's Trusts*, L. R. 2 Eq. 507; and see Trustee Act, 1925, s. 31.
(*k*) *De Pereda* v. *De Mancha*, 19 Ch. D. 451; 51 L. J. Ch. 204.
(*l*) *Brown* v. *Collins*, 25 Ch. D. 56; 53 L. J. Ch. 368. The Court will in such a case be slow to hold the infant to be a ward of Court.
(*m*) *Re Graham*, L. R. 10 Eq. 530; 45 L. J. Ch. 724.
(*n*) Per Hall, V.-C., in *De Pereda* v. *De Mancha* (*ubi sup.*).
(*o*) *Ex parte Brewer, Re Wilts and Somerset Railway*, 2 Dr. & Sm. 552.
(*p*) Macph. Inf. 104.
(*q*) *Brown* v. *Collins*, 25 Ch. D. 56; 53 L. J. Ch. 368.

may be made a ward of Court even where it is out of the jurisdiction, if there is property in this country in which it is interested, and which can be administered by the Court and even where there is no property in this country (*r*), though this would not be the case where the infant was an alien but possessed property in this country, and guardians abroad had been appointed to him (*s*). The effect of this is that if an order of the Court is made requiring the infant to be brought back within the jurisdiction, and is served upon the person who has the custody, and he disobeys it by keeping the infant abroad, or by marrying it without the consent of the Court, he can be attached for contempt on coming within the jurisdiction.

When the Court will Act. The Court will not ordinarily act unless there is something before it upon which it can exercise its jurisdiction; in other words, where there is no property of the infant to administer, there the Court does not not interfere. Thus, Lord Eldon has said: "This Court has not the means of acting, except where it has property to act upon. It is not, however, from any want of jurisdiction that it does not act, but from a want of means to exercise its jurisdiction, by applying property for the use and maintenance of the infants" (*t*). A very small amount of property, money, or otherwise (£100 is sufficient), need be settled upon the infant to make him a ward of Court (*u*); a mere contingent right to property is enough to found the jurisdiction of the Court (*x*). Where the Court is exercising its statutory jurisdiction, such as appointing a guardian under the Marriage Act (*y*) for the purpose of giving consent to the marriage of an infant, the infant need not possess any property (*z*), but the petition for such purpose must be presented pursuant to the statute, or it will be dismissed (*a*).

The purely protective jurisdiction of the Court exercising the delegated power of the Crown can be put in force without the infant possessing any property, and the Court may make an order for the delivery of an infant to the party who ought to have the custody of it, on petition, as well as under the general jurisdiction upon *habeas corpus*, which it shares with the common

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(*r*) *Re Willoughby (an Infant)*, 30 Ch. D. 324; 54 L. J. Ch. 1122.
(*s*) See *Brown* v. *Collins* (*ubi sup.*); *Re Bourgeoise*, 41 Ch. D. 310. See Part III., chap. ii., p. 628.
(*t*) *Wellesley* v. *Duke of Beaufort*, 2 Russ. 1, 21.
(*u*) *Re Lyons*, 22 L. T. 770.
(*x*) *Russell* v. *Nicholls*, 16 L. J. Ch. 477.
(*y*) 4 Geo. IV. c. 76, s. 17. (*z*) *Re Woolscombe*, 1 Madd. 213.
(*a*) *Ex parte Becher*, 1 Bro. C. C. 556.

law Courts (*b*). So far as the practice has been, it seems that an infant will not be made a ward of Court unless there is some property the trusts of which the Court can administer in the interests of the ward; but where the Court is merely asked to exercise its powers for the protection and assistance of the infant, there no question of property arises, and none is required for the purpose. If ever occasion requires that the Court should put in force the jurisdiction which it exercises in the case of its wards, for the benefit of an infant who has no property, it will dispense with the necessity of settling any sum, however trifling, upon the infant (*c*). In this sense all British subjects who are infants are wards of Court, because they are subject to the parental jurisdiction which is entrusted to the Court (*d*). But it is a limited jurisdiction, and where the infant has no property under the control of the Court, the Court cannot provide any scheme for its maintenance or education. No next friend of a penniless infant, no relation, no kind or charitable person, no co-religionist of the infant, no priest or minister of religion, has any right except of informing the Court of what is wrong, and asking the Court's assistance on behalf of the infant (*e*).

Effect of Making Infant Ward of Court.—The effect of an infant being made a ward of Court upon those who have the care and control of him has been thus described: "If there be a parent living within the jurisdiction of the Court, or if there be a testamentary guardian within the jurisdiction of the Court, the Court in that case does not interfere for the purpose of appointing a person to discharge the duty which is imposed upon the Court itself of taking care of the person of the infant, but the parent or testamentary guardian is subject to the orders and control of the Court, precisely in the same way as an officer appointed by the authority of the Court, for the purpose of discharging the duties to which I have referred. I apprehend that is clearly the law of the Court of Chancery, and it has always been so, as far as I have been able to understand and comprehend" (*f*).

(*b*) *Re Spence*, 2 Ph. 247; *Re Fynn*, 2 De G. & Sm. 457.

(*c*) See Story, Eq. Jur. 1351, and the remarks of Cotton, L.J., in *Agar-Ellis* v. *Agar-Ellis*, *Re Lascelles*, 24 Ch. D. 317, 332; 53 L. J. Ch. 10.

(*d*) See *Brown* v. *Collins*, 25 Ch. D. 56; 53 L. J. Ch. 368; *Re Spence* (*ubi sup.*); *Re Fynn* (*ubi sup.*); *Barnardo* v. *McHugh*, [1891] App. Cas. 388; *Re Scanlan* (*Infants*), 40 Ch. D. 200; 57 L. J. Ch. 718; *Re Nevin* (*an Infant*), [1891] 2 Ch. 299; 60 L. J. Ch. 542.

(*e*) *Re M'Grath* (*Infants*), [1893] 1 Ch. 143; 62 L. J. Ch. 208.

(*f*) Per Lord Lyndhurst in *Johnstone* v. *Beattie*, 10 Cl. & Fin. 85.

SECTION 2.

Jurisdiction of the Court over its Wards.

Generally.—The Court insists upon its orders being carried out, and punishes those who neglect or attempt to evade them. It does not wait for an injury to be done to the wards, but on the slightest suspicion of harm to them, interferes with preventive rather than remedial efficacy, and removes them from the source of danger. No act can be done affecting the person, the property, or the state of the minor, unless under the express or implied direction of the Court itself. "Every act done without such direction is treated as a violation of the authority of the Court, and the offending party will be arrested upon the proper process for the contempt, and compelled to submit to such orders and such punishment by imprisonment as are applied to other cases of contempt. Thus, for example, it is a contempt of the Court to conceal or withdraw the person of the infant from the proper custody, to disobey the orders of the Court in relation to the maintenance or education of the infant, or to marry the infant without the proper consent or approbation of the Court. . . . Indeed, when once the Court of Chancery has thus directly or indirectly assumed authority over the person or property of the infant, as its ward, it acts throughout with all the anxious care and vigilance of a parent, and it allows neither the guardian nor any other person to do any act injurious to the rights and interests of the infant" (*g*).

The father, or other guardian, may have orders made upon him regulating his conduct, and if he fail to comply with the directions of the Court, he will be removed from his trust; and in this respect no difference will be made between a parent and a guardian who is a stranger in blood to the ward. The Court may, if it thinks fit, control the education of its ward; thus, while the Court may order its ward to be educated in the religious faith of its dead father (*h*), yet if the father has altogether forfeited or abandoned his right to educate his children in his own faith, the Court, on their becoming its wards, can pronounce in what religious faith they shall be brought up (*i*).

(*g*) St. Eq. Jur. 1353.

(*h*) *Hawksworth* v. *Hawksworth*, L. R. 6 Ch. App. 539; 40 L. J. Ch. 534.

(*i*) *Andrews* v. *Salt*, L. R. 8 Ch. App. 622; *Re Newton (Infants)*, [1896] 1 Ch. 740; 65 L. J. Ch. 641. For further details of this subject, see Part II., Parent and Child, chap. ii. p. 528 *et seq.*

SECTION 3.

Marriage of Wards of Court.

The sanctioning of the marriage of its wards is an "important and delicate duty of the Court of Chancery, which it exercises with great caution" (*k*). The reasons which actuate the Court are the same as those which dictate to the dutiful parent the necessity of encouraging suitable and fitting marriages among his children. Before the wards are allowed to marry, it is necessary to apply to the Court for leave to marry, and this leave will not be granted unless the marriage appear suitable, and the settlement proposed is proper (*l*). Parties desirous of marrying wards of Court must petition the Court for leave to do so.

A marriage is said to be fitting or suitable when the ages of the parties agree, and there is a fair equality of rank and fortune between them, and a proper settlement has been agreed upon between them. When the Court is satisfied of the fitness of the match, it makes an order giving leave to the parties to intermarry (*m*). The jurisdiction of the Court is not ousted because the parents of the ward are alive, or there is a testamentary guardian, and their consent to the ward's marriage does not render the leave of the Court unnecessary (*n*). The Court will interfere with parents and guardians who are endeavouring to bring about a marriage without acquainting the Court of the fact, and will commit the ward to the custody of another (*o*).

The Court will assist parents or guardians to prevent the improper marriage of their wards, and they will be ordered not to permit the marriage without the Court's consent (*p*).

Contempt of Court.—To marry a ward of Court without the leave of the Court is treated as a serious contempt, and visited at times with severe punishment, and this is so even where the party marrying the ward is an infant (*q*). The contempt is just as great where the father or the guardian consents to the marriage. It is not a more heinous offence for a man to marry

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(*k*) St. Eq. Jur. s. 1358.
(*l*) *Smith* v. *Smith*, 3 Atk. 304; *Earl of Plymouth* v. *Lewis*, 2 Dick. 801.
(*m*) Set. Judg. & Ord. 891 *et seq.*
(*n*) *Wellesley* v. *Duke of Beaufort*, 2 Russ. 1, 28.
(*o*) *Vernon* v. *Vernon*, 10 Geo. I., cited *Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. 103, 113; *Pearce* v. *Crutchfield*, 14 Ves. 206; *Lord Shipbrook* v. *Lord Hinchinbrook*, 2 Dick. 547; *Tombes* v. *Elers*, 1 Dick. 88; and see *Smith* v. *Smith* (*ubi sup*).
(*p*) *Lord Raymond's Case*, Cas. t. Talb. 58.
(*q*) *Edes* v. *Brereton*, West, Cas. t. Hardw. 348.

a female ward than for a woman to marry a male ward, if the sanction of the Court be not obtained. Those who have aided and abetted in bringing about the marriage will also be brought before the Court and censured or punished as they may deserve (*r*).

To contrive or attempt to bring about a marriage without the leave of the Court is a contempt just as much as the actual marriage itself; and if the parties persist in running counter to the directions of the Court they will be punished. Since the Court prefers to prevent mischief rather than punish breaches of the law, when it is informed of an intended clandestine marriage of one of its wards, it will by injunction not only interdict the marriage, but restrain the parties from communicating with one another (*s*), whether in person or by letter (*t*); and where it suspects the parent (*u*) or guardian of any connivance, it will remove the infant from his care and custody, and intrust him to that of a committee (*x*). In order to obtain evidence of an attempt to bring about a clandestine marriage, the Court will order letters containing promises of marriage from the intended husband to the wife to be delivered up (*y*), though not mere letters of civility (*z*). It will give effect to hearsay evidence not contradicted by the other side. In a case of *Beard* v. *Travers* (*a*), Lord Hardwicke said: "In cases relating to clandestine marriages, hearsay evidence and declarations are no defective proof, but have weight with the Court, especially when uncontradicted by anything on the other side." In such a case, although the mere fact of marrying a ward of Court without the leave of the Court is always a contempt, a general order will be made that an infant shall not be married without leave of the Court, and that persons shall have no access to him or her by letter or otherwise (*b*).

Any person may bring to the notice of the Court that one of

(*r*) *Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. 103; *Hughes* v. *Science*, Amb. 302 n.; Macph. Inf. Appdx. I.; 2 Fonb. Eq. Bk. II. Part II. chap. ii. s. 1; St. Eq. Jur. 1358; Set. Dec. 900, 901.

(*s*) *Pearce* v. *Crutchfield*, 14 Ves. 246. In Seton (pp. 894—896) are set out orders restraining marriage or intercourse with the ward, and subsequent orders; also references to various orders in one case, which give a history of the transaction, beginning with an order restraining the principal and conniving parties from all intercourse with the ward, and ending with an order dismissing petition for leave to marry the ward.

(*t*) *Dawson* v. *Thompson*, 12 L. T. 178.

(*u*) *Lord Shipbrook* v. *Lord Hinchinbrook*, 2 Dick. 547; *Roach* v. *Garvan*, 1 Ves. Sen. 160.

(*x*) *Tombes* v. *Elers*, 1 Dick. 88.

(*y*) *Smith* v. *Smith*, 3 Atk. 304.

(*z*) *Ibid.*

(*a*) 1 Ves. Sen. 313.

(*b*) See *Smith* v. *Smith* (*ubi sup.*).

its wards has been married, or is about to be married, without its leave. The Court will thereupon direct a reference to inquire whether a valid marriage has taken place, and if it has what settlement ought to be ordered under the circumstances (*c*).

The jurisdiction of the Court is not ousted by the lapse of a considerable period before the complaint is brought; for whether the communication of the fact that a contempt has been committed comes early or late, the Court has jurisdiction, and may feel a duty to punish that contempt; yet it would not be a very wholesome exercise of discretion to punish the offence harshly, if in view of circumstances that have occurred in the course of six, seven, or eight years, the Court does not feel called upon to vindicate the jurisdiction. The jurisdiction is exercised really for the benefit of the infant, and the Court ought to look with great attention to all the circumstances of each case (*d*).

The fact of contempt of Court is not affected by the marriage of the ward being valid or invalid (*e*); but where the marriage is of doubtful validity, the Court will order an inquiry to be made whether it is or is not valid; and in the meantime direct all intercourse between the parties to be terminated. Where the marriage is found to be invalid, and the ward is a female, and the parties have cohabited, a valid remarriage will be ordered (*f*). Where the ward is a male, and has been led into a derogatory connection, the Court will order steps to be taken to have the invalid marriage set aside (*g*); but the Court can, if it sees fit, direct that the paties should be validly remarried (*h*); but in such a case it is submitted, the consent of the ward to the valid marriage must be secured.

Aggravation of Contempt.—Incongruity of age between the parties is an aggravation of the contempt; thus, where an infant, an undergraduate of Oxford, was entrapped into a marriage with a common servant maid older than himself, the circumstances of the case were deemed an aggravation of the contempt (*i*); so, too, where a female ward of sixteen was married to an old man of sixty (*k*); or one of twelve years and a half was married to her guardian (*l*).

(*c*) Macph. Inf. 191.
(*d*) Per Lord Eldon in *Ball* v. *Coutts*, 1 V. & B. 292, 302.
(*e*) *Warter* v. *Yorke*, 19 Ves. 451.
(*f*) *Bathurst* v. *Murray*, 8 Ves. 74. See Simp. Inf. 336.
(*g*) *Warter* v. *Yorke* (*ubi sup.*). (*h*) See *Re Murray*, 3 Dr. & W. 83, 86.
(*i*) *Herbert's Case*, 3 P. Wms. 116.
(*k*) *Hughes* v. *Science*, cited Amb. 302; Macph. Inf. Appdx. I.
(*l*) *Harford* v. *Morris*, 2 Hag. Con Rep. 423.

Inequality of rank and fortune is also an aggravation of the contempt. Thus, in all cases where the ward has been a person of fortune or good rank, and has contracted a marriage with a person of no fortune or low birth, the Court has deemed that fact to be an aggravation of the contempt (*m*). It is not necessary that the person marrying the ward should be beneath him both in rank and fortune; it is sufficient if the inequality be as regards fortune only; a son of a peer who had no fortune or allowance except what he obtained from his father or other relatives, was restrained from marrying an infant heiress and ward of Court (*n*). The contempt is aggravated where there has been criminality or fraud in bringing about the marriage, or where confidential relationships between the ward and the person marrying the ward are abused (*o*).

Mitigation of Contempt.—Some instances of contempt of Court are not so flagrant or heinous as others, and a contempt may be committed which does not call for any severe punishment from the Court. Thus, where the party in contempt has been imposed upon, and kept in ignorance of the true state of the facts, the Court will deal leniently with such a case. But ignorance of the fact that the party married is a ward of Court is no defence (*p*); and in one instance where a female was made a ward of Court on the same day that she was married in Scotland the marriage with her was deemed a contempt (*q*); but if the marriage is in other respects proper, it is a mitigation of the offence (*r*). The contempt, if venial and slight, will be overlooked, and not visited with any punishment, but creates a jurisdiction over the party in contempt which can be enforced against him at any time in respect of the settlement of the property of the ward (*s*). If the contempt is not aggravated in its nature, or if the committal of the husband would work great injury, an undertaking to execute a settlement might be deemed sufficient exoneration (*t*).

Punishment of Contempt.—If the offence is brought home to the parties they will be punished with considerable severity.

(*m*) See *Herbert's Case* (*ubi sup.*); *Priestly* v. *Lamb*, 6 Ves. 421; *Butler* v. *Freeman*, Amb. 302.
(*n*) *Smith* v. *Smith*, 3 Atk. 304; *Gordon* v. *Irwin*, 4 B. P. C. 355.
(*o*) *Priestly* v. *Lamb*, 6 Ves. 421. See *Hodgens* v. *Hodgens*, 4 Cl. & Fin. 323.
(*p*) *Barrington* v. *Grogan*, Beatt. 199.
(*q*) *Salles* v. *Savignon*, 6 Ves. 572.
(*r*) *Richardson* v. *Merrifield*, 4 De G. & S. 161.
(*s*) *Martin* v. *Foster*, 25 L. T. (o.s.) 5; *Ball* v. *Coutts*, 1 V. & B. 292.
(*t*) *Winch* v. *James*, 4 Ves. 386.

The usual punishment is committal to prison. In former days when the person in contempt was a peer, sequestration and not imprisonment was resorted to (*u*); but in modern times privilege of Parliament would not prevent the contemnor being sent to prison (*x*). It does not, however, always follow that it will be to the ward's interest that the person in contempt should be punished by commitment; the practice is accordingly to bring the matter of the contempt before the Court by summons in chambers and not in open Court, in order that the judge may inquire whether it would be for the infant's benefit that the contemnor should be committed. If the facts disclosed warrant a committal, the Court on a motion to that effect will make an order for the committal of the contemnor (*y*). Commitment to prison is not the only method pursued by the Court to punish contemnors of its jurisdiction; but in very gross cases, where it does not consider commitment sufficient, it will order criminal proceedings to be taken against them for perjury or conspiracy (*z*). Where in a gross case the contemnors can be punished not only by imprisonment but by other ways, the Court will not hesitate to visit them with a severe punishment; thus a justice of the peace will be removed from the commission, a barrister disbarred, and a solicitor struck off the rolls (*a*). The orders of the Court must be obeyed; thus, where a ward was induced to marry a prostitute, and the Court ordered him to be sent abroad, and restrained the wife from having any intercourse or communication with him, it was held that he did not conduce to her subsequent adultery (*b*).

When the contemnors have been committed to prison, they will not be kept there for an indefinite time (*c*), but after a certain period will be liberated on their petition expressing contrition and declaring their willingness to submit to any such order as the Court may think fit to make (*d*). But the Court will not listen to the submission of the contemnor, and liberate him from confinement, if it does not think he has been sufficiently

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(*u*) *Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. 103.

(*x*) *Long Wellesley's Case*, 2 R. & M. 639.

(*y*) *Brown* v. *Barrow*, 48 L. T. 357.

(*z*) See *Pearce* v. *Crutchfield*, 16 Ves. 48; *Ball* v. *Coutts*, 1 V. & B. 292; *Wade* v. *Broughton*, 3 V. & B. 172; *Schreiber* v. *Lateward*, 2 Dick. 592.

(*a*) *Ex parte Mitchell*, 2 Atk. 173.

(*b*) *Beavan* v. *Beavan*, 8 Jur. (N.S.) 1110.

(*c*) Parties have been kept in prison as long as seven months. See *Baseley* v. *Baseley*, 4 Cl. & Fin. 378 n; *Re Sampson and Wall*, 25 Ch. D. 482; 53 L. J. Ch. 457.

(*d*) Simp. Inf. 337.

punished (*e*). The Court will not order the discharge from prison of a person committed for contempt by marrying an infant ward, until a certificate has been produced of the due solemnization of the marriage, and a proper settlement of the ward's property has been prepared and approved (*f*).

Where the female ward is the wrong-doer, the Court will punish her by settling the bulk of her property on the issue of the marriage; but where as an infant she has erred in ignorance of her position, it will settle her property on her (*g*); so if her husband err in ignorance, the Court will be more lenient (*h*).

SECTION 4.

Marriage Settlements of Wards of Court.

Upon Marriage with Leave of the Court.—When a marriage of one of its wards is about to take place with its leave and consent, the Court of Chancery directs that a proper settlement shall be made, to take effect upon the intended marriage. The settlements made by infant wards do not derive any force and validity from the approval of the Court, independently of the Infant Settlements Act, 1855 (*i*), under the provisions of which infants can, with the approbation of the Court, make binding settlements of their property, if being males they have attained the age of twenty, and if, being females, the age of seventeen (*k*); and the parties must conform to the requirements of the Act, otherwise the settlement will not be binding (*l*).

The Court has not laid down any hard-and-fast rules for its own guidance, but acts as a prudent father would act (*m*). The active interference of the Court is usually confined to keeping the proposals of the parties within the limits of what it considers expedient and suitable to the circumstances, and deciding in case of a difference of opinion (*n*). But the Court does impose certain conditions when the parties apply for its leave to marry; thus, where the ward is a female, and the

(*e*) *Baseley* v. *Baseley* (*ubi sup.*).
(*f*) *Cox* v. *Bennett*, 22 W. R. 819.
(*g*) *Wilkinson* v. *Joughin*, 41 L. J. Ch. 234.
(*h*) *Richardson* v. *Merrifield*, 4 De G. & S. 161.
(*i*) 18 & 19 Vict. c. 43.
(*k*) See *ante*, chap. iv. p. 821.
(*l*) *Savill* v. *Savill*, 2 Coll. 72; *Field* v. *Moore*, 25 L. J. Ch. 66.
(*m*) *Martin* v. *Foster*, 25 L. T. (o.s.) 5.
(*n*) 3 Dav. Prec. Part I. 654. For the usual limitations of the settlement, see 3 Dav. Prec. Part I. 68—70, 195.

bulk of the property moves from her, it will not sanction an exclusive settlement of her fortune upon the issue of the first marriage; but will cause a clause to be inserted enabling her to provide for the issue of a subsequent marriage (*o*). It will also provide by means of a trust for an equal division among all the children by any marriage (*p*); or by giving the ward a power of appointment over the trust funds in favour of a future husband, and the issue of a future marriage (*q*). The Court usually inserts a clause restraining the ward from anticipating her fortune during coverture, but where it has omitted to do so, and she has incumbered it, it will not rectify the settlement so as to prejudice the claims of her incumbrancers (*r*). Where the ward is illegitimate, and so has no next-of-kin, the ultimate limitation is to her absolutely (*s*).

It was formerly usual to insert a clause settling after-acquired property; but since the coming into operation of the Married Women's Property Act, 1882 (*t*), it will scarcely be deemed necessary to make this provision, since the property acquired by the wife during coverture is unaffected by any rights of her husband. The Court would have ample jurisdiction to insert such a provision (*u*).

Marriage of Ward after Attaining Majority.—A ward of Court on attaining twenty-one ceases to be wholly under the control and jurisdiction of the Court, and can marry without first obtaining the consent of the Court to his or her union. But it does not follow that on the ward attaining majority, the Court will in all cases relax its hold over the property of its late ward which it retains in its own possession. A female ward of Court, when of age, may make whatever settlement of property she pleases, but her property will never be discharged from the protection of the Court, except by its order; and, consequently, she and her property will always be considered as having the protection of the Court (*x*). But whether the Court would enforce a settlement contrary to the wishes of both husband and wife is not a settled point (*y*). And in one case, though

(*o*) *Halsey* v. *Halsey*, 9 Ves. 471; *Rudge* v. *Winnall*, 11 Beav. 98; *Long* v. *Long*, 2 Sim. & St. 119; and see *Re Horne's Trusts*, 4 Giff. 254, where, however, the foregoing cases were not cited.
(*p*) *Millett* v. *Rowse*, 7 Ves. 419. (*q*) 3 Dav. Prec. Pt. I. 656.
(*r*) See *Blackie* v. *Clark*, 15 Beav. 607; 22 L. J. Ch. 377.
(*s*) *Kent* v. *Burgess*, 11 Sim. 361.
(*t*) 45 & 46 Vict. c. 75.
(*u*) Sect. 19. See *ante*, Part I. chap. viii. p. 106.
(*x*) Per Lord Eldon in *Austen* v. *Halsey*, 2 Sim. & St. 123 n, 125 n.
(*y*) See *Martin* v. *Foster* (*ubi sup.*).

the wife was still a minor, and there was contempt on the part of the husband of a very flagrant and gross description, the Court of Appeal directed that the settlement (a post-nuptial one) should be so drawn as to give the wife power to appoint an interest in favour of her husband in case she died without leaving issue (*z*). The lady's estate consisted of personalty only. Kay, J., whose decision was overruled, had decided that the husband should be excluded from taking any interest whatever in his wife's property, and that she should have no power to make an appointment in his favour, even though there was no issue of the marriage living at her death. The wife strongly objected to this scheme. The Court will have regard to the wishes of the parties in the appointment of trustees, and will not choose persons who are distasteful to the ward to serve in that capacity (*a*). But the Court has certainly no jurisdiction to compel a ward after attaining majority to execute a settlement (*b*).

Where proposals for a settlement on the marriage of a ward have been accepted and approved by the Court, as above stated, it will not permit the parties by delaying their marriage till the ward attains majority to defeat the original settlement; thus, where a female infant had been made a ward of Court, and in contemplation of her marriage terms for the settlement of her property and that of her intended husband (which were for the benefit of the intended husband and wife, and the issue of the marriage) had been approved by the master, and his approval had been confirmed by the Court, it was held not to be competent to the husband and wife, by delaying the marriage till after the wife had attained her majority, and entering into fresh settlements, to defeat the settlement of the Court (*c*).

To attempt purposely to delay or defeat the directions of the Court is a contempt, and can be punished as such (*d*). Where in one case the parties (one being a ward of Court), having made proposals for a settlement which the Court would not have approved of about six months before the ward came of age, waited until the ward attained her majority, and then executed the settlement in accordance with the proposals, the Court claimed to exercise jurisdiction over the ward, and ordered the

(*z*) *Re Sampson and Wall*, 25 Ch. D. 482; 53 L. J. Ch. 457.
(*a*) *Ibid.*
(*b*) See *Re Leigh, Leigh* v. *Leigh*, 40 Ch. D. 290; 58 L. J. Ch. 306.
(*c*) *Hobson* v. *Ferraby*, 2 Coll. 412.
(*d*) See *Biddles* v. *Jackson*, 7 W. R. 248.

settlement to be rectified in a manner suitable to the position of the parties (*e*). It will also consider itself not ousted of its jurisdiction by the mere lapse of time, though it will take into consideration the rights and interests of persons who have come into *esse* in the meantime (*f*). The Court will rectify an improper settlement made after the ward has attained majority, unless she consents to be bound by it (*g*).

Where a female ward of Court has attained majority and marries, but she and her husband have not previously agreed upon or executed a settlement, the Court cannot, except the conduct of the parties has amounted to what, under other circumstances would be a contempt of Court, enforce upon them the acceptance of any particular settlement (*h*). But where the fund belonging to the ward is in the hands of the Court, a different practice seems to prevail, and the Court retains its jurisdiction over the property of a ward of the Court after the ward attains twenty-one, so long as the property remains in Court; and if the ward marries, it will order a proper settlement to be made, or reform an improper one, unless the ward consents to the settlement either in Court, or under a commission (*i*). But where the sum is small, and expense and inconvenience would attend its being kept in Court as a settled fund, the Court will order it to be paid out to the ward (*k*); and now to the ward alone, and not, as was sometimes done, to the husband (*l*). But the Court has not the power to compel a male ward to execute a settlement excluding the wife from all participation in his fortune (*m*).

Upon Marriage in Contempt of Court.—Where the marriage has been in contempt of Court, the punishment for the offence is frequently used for the purpose of compelling the party marrying the ward to make or agree to a settlement approved by the Court, which refuses to allow the offending party to purge the contempt without making (if able to do so) a proper settlement. The principle by which the Court is guided is that the offending party shall not derive any benefit from his wrong.

In flagrant cases of contempt, the Court visits the offending

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(*e*) *Money* v. *Money*, 3 Dr. 256.
(*f*) *Cave* v. *Cave*, 15 Beav. 227.
(*g*) *Long* v. *Long*, 2 Sim. & St. 119.
(*h*) See *Bolton* v. *Bolton*, [1891] 3 Ch. 270; 60 L. J. Ch. 689.
(*i*) *Austen* v. *Halsey*, 2 Sim. & St. 123 n.
(*k*) *Longbottom* v. *Pearce*, 3 De G. & J. 545 n; *White* v. *Herrick*, L. R. 4 Ch. App. 345. In *Sams* v. *Cronin*, 22 W. R. 204, which followed *White* v. *Herrick*, it does not appear whether the sum in Court was large or small.
(*l*) Under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).
(*m*) *Re Murray*, 3 Dr. & W. 83.

party, if the husband, not only with the physical punishment of commitment, but goes further, and deprives him, as a rule, of all benefit and interest in the ward's fortune (*n*); or gives him but a very small share of it, unless he brings in an equivalent provision, or the depriving him of such interest would be to the detriment of the ward (*o*). The husband who is guilty of contempt is excluded as against the wife altogether, and generally as against the children, but it is usual to allow the wife power to appoint an interest in favour of her husband in the event of there being no issue (*p*). Where the female ward is the wrong-doer, the Court will punish her by settling the bulk of her property on the issue of the marriage.

In cases where the contempt is venial in its nature, the Court will take that fact into consideration, and be correspondingly lenient in its treatment of the offending party, and if the married ward be a female, will under certain circumstances allow the husband to enjoy a portion of her income during his life (*q*); so, where both parties were ignorant that the female infant was a ward, the Court on petition settled her property on her for life, with remainder to her children; and with a power for the wife to appoint the property by will to her husband for his life (*r*). Again, where the husband married in ignorance that his wife was a ward of Court, the Court approved of a settlement by which a considerable portion of the wife's fortune was paid to the husband, and he was given a life interest in the moiety of the residue of her fortune, if he survived her (*s*). In most of the cases the husband has been a man of no property, who married apparently for the sake of the fortune; and the Court has generally refused to give him any interest in the property (*t*); but where he is of equal rank and fortune with the wife, and makes an equivalent provision for her out of his own property, it does not seem that the same rule would be enforced; and where the husband had no property, and the contempt was not a flagrant one, the costs of the settlement (including the husband's) were ordered to be paid out of the funds (*u*); and even in a very flagrant case, in which the

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(*n*) *Kent* v. *Burgess*, 11 Sim. 361; *Wade* v. *Hopkinson*, 19 Beav. 613.
(*o*) *Birkett* v. *Hibbert*, 3 Myl. & K. 227; *Field* v. *Moore*, 24 L. J. Ch. 161.
(*p*) *Anne Walker's Case*, Ll. & G. 325. See *Re Sampson and Wall*, 25 Ch. D. 482; 53 L. J. Ch. 457.
(*q*) *Bathurst* v. *Murray*, 8 Ves. 74.
(*r*) *Wilkinson* v. *Joughin*, 41 L. J. Ch. 234.
(*s*) *Richardson* v. *Merrifield*, 4 De G. & S. 161.
(*t*) *Ball* v. *Coutts*, 1 V. & B. 292, 303. (*u*) *Anon.*, 4 Russ. 473.

husband had been convicted of a conspiracy, he was allowed to receive a sum of £2,000 out of his wife's fortune, in order to pay debts which he alleged he had contracted for her (*x*).

Infant Settlements Act, 1855.—The Court has claimed the power under the Infant Settlements Act, 1855 (*y*), to direct a settlement of a male or female infant's property, being a ward of Court, even after the marriage has taken place (*z*). But whether this claim is rightly founded is a question which calls for a clear decision from the highest tribunal (*a*). In one case the Court held it had no jurisdiction under this Act to compel an infant ward of Court to make a settlement of his own property because he had been guilty of contempt in marrying without leave (*b*).

Section 5.

Taking Ward out of the Jurisdiction.

The Court of Chancery will not, as a rule, allow its wards to be removed out of the jurisdiction; if they could be so removed without its leave, it would have no guarantee that they would be brought up and treated in a manner of which it would approve; and they might contract marriages which it never would have sanctioned; in fact, it would lose all control over them both in the present and in the future. The Court will enforce its orders not only against strangers, but against guardians (*c*), and even against the father himself (*d*). It will order wards to be brought back who have been taken abroad without its permission (*e*).

To remove an infant out of the jurisdiction is a serious contempt, which the Court will punish severely by commitment to prison (*f*); and privilege of Parliament will be no protection against such committal (*g*). Before an infant ward can be properly removed out of the jurisdiction, the leave of the Court

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(*x*) *Pearce* v. *Crutchfield*, 16 Ves. 48; Dav. Prec. vol. iii. Part I. 659.
(*y*) 18 & 19 Vict. c. 43.
(*z*) *Re Sampson and Wall*, 25 Ch. D. 482; 53 L. J. Ch. 457; *Re Phillips* (*an Infant*), 34 Ch. D. 469;; 56 L. J. Ch. 337.
(*a*) See *Seaton* v. *Seaton*, 13 App. Cas. 61; 57 L. J. Ch. 661; *Re Leigh*, *Leigh* v. *Leigh*, 40 Ch. D. 290; 58 L. J. Ch. 306.
(*b*) *Re Leigh*, *Leigh* v. *Leigh* (*ubi sup.*).
(*c*) *Newport* v. *Moore*, 1 Dick. 166.
(*d*) *Re Fynn*, 2 De G. & S. 457; *Re Plomley*, *Vidler* v. *Collyer*, 47 L. T. 283.
(*e*) *Foster* v. *Denny*, 2 Ch. Cas. 237.
(*f*) *Re J.* (*an Infant*), 108 L. T. 554.
(*g*) *Wellesley* v. *Duke of Beaufort*, 2 Russ. & Myl. 639.

must be first obtained. The Court was wont not to grant permission readily (*h*), but did accede from time to time to the request to remove them (*i*). Its practice was to refuse an order permitting its infant wards to be removed out of the jurisdiction, with a view to their residing permanently abroad, except in a case of imperative necessity, as where it is clearly proved that a constant residence in a warmer climate is absolutely essential to their health (*k*); and such an order, if made, would comprise a scheme for the education of the infants, as well as a provision for informing the Court from time to time of their progress and condition, and an undertaking to bring them within the jurisdiction when required (*l*). But in modern times the Court is less strict in the exercise of this jurisdiction, and leave is now given to take an infant ward out of the jurisdiction without a case of necessity being shown; but the Court must be satisfied that the removal is for the infant's benefit, and that future orders will be obeyed. Security in this respect is generally attained by appointing a guardian to act jointly in this country with the parent (*m*). Where it is desired that the wards should go abroad for a temporary residence, for the purposes of health and recreation, or for education, leave is more readily granted; but the Court will insist upon security being given for the due return of the wards, and especially that they should not be married without its leave (*n*). The Court will not allow its wards without leave to enter the army or navy, thereby becoming liable to be removed out of the jurisdiction (*o*); though where it is for their benefit that they should remain in the service, leave will be obtained (*p*). If a father is obliged to leave the jurisdiction, and his children are wards of Court, he will in general be permitted to take them with him; but in such a case he will be compelled to keep the Court informed from time to time by proper vouchers of the plan of the education of the wards, and of their residence (*q*); so, too, a sick mother, who travels abroad to recruit her health, will be permitted to take

(*h*) See *Mountstuart* v. *Mountstuart*, 6 Ves. 363; and *De Manneville* v. *De Manneville*, 10 Ves. 52.
(*i*) *Jackson* v. *Hankey*, cited as *Anon*, Jac. 265 n.
(*k*) *Campbell* v. *Mackay*, 2 Myl. & Cr. 31.
(*l*) *Ibid.*
(*m*) *Re Callaghan, Elliott* v. *Lambert*, 28 Ch. D. 186; 54 L. J. Ch. 292.
(*n*) *Jeffreys* v. *Vanteswarstwarth*, Barn. Ch. 141; *Re Medley*, 6 Ir. R. Eq. 339.
(*o*) *Rochford* v. *Hackman*, Kay, 308.
(*p*) *Harrison* v. *Goodall*, Kay, 310 n.
(*q*) *Jackson* v. *Hankey*, cited as *Anon*, Jac. 265 n.

her infant child (a ward of Court) with her (*r*). And where the intention is not to keep the wards permanently abroad, or, in the case of females, where they have arrived at years of discretion, leave of the Court to go abroad will be granted, for travelling purposes (*s*), or on account of ill health (*t*), or to visit relations (*u*), or a sick parent (*x*). Wards, too, have been allowed to reside abroad; thus, two sisters, wards, arrived at years of discretion, were allowed to live with their aunts (their only relations), who resided abroad (*y*); a female ward was allowed to join her stepfather in India, the Court being satisfied that she would be properly looked after on the voyage and on her arrival in India (*z*); and a girl of eighteen was allowed to reside with her brother abroad, her guardian consenting (*a*).

But since, under ordinary circumstances, a ward of Court cannot be removed out of the jurisdiction, those who seek its removal must make out a case for that purpose. But where an infant is made a ward of Court solely for the purpose of preventing his removal from this country, the obligation is shifted, and the onus of showing that it is not for his benefit to remain at home lies upon the party seeking to restrain his removal (*b*).

Disclosure of Residence of Ward.—It is also a contempt to conceal from the Court the place of residence of the ward, whether it be within or outside of the jurisdiction; and all parties who either know, or are supposed to know, of its place of residence, can be summarily ordered to give such information as is within their knowledge. It is not absolutely necessary that the infant should be a ward to give the Court jurisdiction to insist upon those who are aware of its place of concealment affording the requisite information (*c*). There is no doubt an expression of opinion by Lord Cottenham in the case of *Re Spence* (*d*), to the effect that the Court cannot compel parties who have not the infants in their custody to disclose facts of which they are the mere witnesses; but, as was pointed out by

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(*r*) *Lyon* v. *Watson*, cited Chamb. Inf. 22.
(*s*) *Spencer* v. *Earl of Chesterfield*, Amb. 146.
(*t*) *Wyndham* v. *Lord Ennismore*, 1 Keen, 467.
(*u*) *Ex parte M'Key*, 1 B. & B. 405.
(*x*) *Biggs* v. *Terry*, 1 Myl. & Cr. 675.
(*y*) *Jeffreys* v. *Vanteswarstwarth*, Barn. Ch. 141. See also *Dawson* v. *Jay*, 23 L. T. (o.s.) 239.
(*z*) *Campbell* v. *Campbell*, cited Chamb. Inf. 30.
(*a*) *Clogstoun* v. *Wallcott*, 9 Jur. 649.
(*b*) Per Jessel, M.R., in *Re Plomley*, *Vidler* v. *Collyer*, 47 L. T. 283.
(*c*) *Re Spence*, 16 L. J. Ch. 309.
(*d*) *Ubi sup.*

Chitty, J., in *Rosenberg* v. *Lindo* (*e*), the observation was not material to the decision of that case. The contrary practice has been clearly established, and it is now settled that no person whatsoever is entitled to conceal the residence of a ward, or do anything which will prevent the Court from having access to its wards, and putting them under proper protection (*f*). Thus, a solicitor has been held bound to give to the Court any information which may lead to the discovery of the residence of a ward of Court whose residence is being concealed from the Court, although such information may have been communicated to him by his client in the course of his professional employment, and he was ordered to produce the envelopes of letters which he had received from her as her solicitor, with the object of discovering her residence from the postmarks (*g*). So, too, a Roman Catholic bishop and the superior of a Roman Catholic convent were in one case ordered summarily to attend before the Court on a *prima facie* case for supposing that they were able to give information as to the place of residence of a ward of Court who was not in the custody of her parents (*h*).

(*e*) 48 L. T. 478.
(*f*) *Ramsbotham* v. *Senior*, L. R. 8 Eq. 575.
(*g*) *Ibid.*; *Burton* v. *Earl of Darnley*, L. R. 8 Eq. 576 n.
(*h*) *Rosenberg* v. *Lindo* (*ubi sup.*).

CHAPTER VI.

REMEDIES FOR THE PROTECTION OF INFANTS.

Section 1.

Protection as Regards the Person.

Habeas Corpus.—If an infant is detained in illegal custody, he is just as much entitled to be liberated from that illegal custody or restraint as if he were an adult; he is, therefore, entitled to a writ of *habeas corpus*. The father or mother (*a*), or legal guardian (*b*), is *prima facie* entitled to the writ; but by recent decisions the Courts have arrogated to themselves the jurisdiction to interfere with the parental and tutorial rights where they conceive the interests of the infant require them to do so (*c*).

Personal Injuries.—An infant is entitled to redress for personal injuries inflicted upon him by the negligence or default of another, though he himself may be a trespasser (*d*).

There is no doubt that an infant who has arrived at years of discretion, though not legally of age, may disentitle himself by contributory negligence from recovering damages by way of compensation for injuries; but this is not the case with regard to an infant of tender years (*e*). To disentitle an infant of tender years to recover, it must be shown that there was no negligence in the defendant. Where the defendant negligently left his horse and cart unattended in the street, and the plaintiff, a child seven years old, got upon the cart in play, and another child incautiously led the horse on, and the plaintiff was thereby thrown down and hurt, the defendant was held liable, though the plaintiff was a trespasser and contributed to the mischief

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(*a*) See *ante*, Part II., Parent and Child, chap. ii. pp. 493 *et seq.*

(*b*) See *ante*, Part III., Guardian and Ward, chap. v. p. 650.

(*c*) See *Re Brown*, 13 Q. B. D. 614; *Reg.* v. *Gyngall*, [1893] 2 Q. B. 232; 62 L. J. Q. B. 559; 54 & 55 Vict. c. 3.

(*d*) *Jay* v. *Whitfield*, cited in *Bird* v. *Holbrook*, 4 Bing. 644; *Ilott* v. *Wilkes*, 3 B. & Ald. 304; *Collins* v. *Lefevre*, 1 F. & F. 436.

(*e*) *Gardner* v. *Grace*, 1 F. & F. 359.

by his own act (*f*). The question is really whether an infant of tender years can be said, by reason of his want of experience and incapacity to judge rightly of the probable result of his acts, to be guilty of negligence. In the course of his judgment in *Lynch* v. *Nurdin* (which was that of the Court), Lord Denman said: "In the present case . . . the plaintiff himself has done wrong; he had no right to enter the cart, and, abstaining from doing so, he would have escaped the mischief. Certainly he was a co-operating cause of his own misfortune by doing an unlawful act; and the question arises whether that fact alone must deprive the child of his remedy. The legal proposition, that one who has by his own negligence contributed to the injury of which he complains cannot maintain his action against another in respect of it, has received some qualifications. Indeed, Lord Ellenborough's doctrine in *Butterfield* v. *Forrester* (3 B. and Ald. 304), which has been generally adopted since, would not set up the want of a superior degree of skill or care as a bar to a claim for redress; ordinary care must mean that degree of care which may reasonably be expected from a person in the plaintiff's situation, and this would evidently be very small indeed in so young a child. But this case presents more than the want of care; we find in it the positive misconduct of the plaintiff an active instrument towards the effect. . . . But the question remains, can the plaintiff, then, consistently with the authorities, maintain his action, having been at least equally in fault? The answer is, that supposing that fact ascertained by the jury, but to this extent, that he merely indulged the natural instinct of a child in amusing himself . . . then we think that the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care. The child, acting without prudence or thought, has, however, shown those qualities in as great a degree as he could be expected to possess them. His misconduct bears no proportion to that of the defendant which produced it" (*g*).

(*f*) *Lynch* v. *Nurdin*, 10 L. J. Q. B. 73. This case has been commented upon in *Lygo* v. *Newbold*, 9 Ex. 302; but it has in part been restored to the position of an authority by Cockburn, C.J., in *Clark* v. *Chambers*, 3 Q. B. D. 327; 47 L. J. Q. B. 427; but his lordship did not deal with the question more nearly affecting the present topic, viz., whether an infant could be disentitled to maintain his action by reason of his contributing to his own mishap.

(*g*) In an American case (*Plumley* v. *Birge*, 124 Mass. 57) it is said that the

Infant Contributing to Own Hurt.—In the following cases he has been held disentitled to recover. A child three years and a half old strayed upon a railway, and had its leg cut off by a passing train, there being no evidence to show that the child got there through any neglect or default on the part of the company (*h*). The defendants, in another case, were the occupiers of a warehouse on one side of a street into which their cellar opened. The public had a right of way over the whole street subject to the existence of the cellar, but the only flagged footpath was on the other side. The defendants took off the lid which covered their cellar, and left it nearly upright against their wall. A child jumped from the lid and pulled it over, injuring himself and another child. The defendants under these circumstances were held not liable at the suit of the child, who had voluntarily meddled for no lawful purpose with that which if left alone would not have hurt him (*i*). It was held, too, that there was no liability where a child sustained fatal injuries from a burning rubbish heap (*k*), nor for injuries sustained by a gate falling owing to boys swinging upon it in the absence of knowledge of its general use in this manner (*l*), nor in respect of the failure to fence a well that an adjoining tenant had the use of, where, although the tenant had complained of its dangerous state, he failed to take care that the child should not be left unattended in its neighbourhood (*m*), nor in respect of injuries sustained on a moving stairway from which trespassing children were continually sent away (*n*), nor from climbing on low iron railings in park where there was no reason to anticipate danger (*o*). But, on the other hand, a cause of action has been held to exist where a child ate poisonous berries growing in a public park where there was no warning (*p*), where a child was injured in playing with a dangerous gate (*q*), and where

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age of the plaintiff is an important fact for the consideration of the jury; that is, that want of ordinary care, which would be no bar to redress in the case of an infant of tender years, would disentitle an older child to recover compensation for injuries. This case, however, would probably, on the merits, have been differently decided in England. As to greater protection to be afforded to infants or infirm persons as being unable to take care of themselves, see *Williams* v. *G. W. Ry. Co.*, L. R. 9 Ex. 137; 43 L. J. Ex. 105, per Kelly, C. B.

(*h*) *Singleton* v. *Eastern Counties Railway Co.*, 7 C. B. (N.S.) 287.

(*i*) *Hughes* v. *Macfie*, 33 L. J. Ex. 177.

(*k*) *Johnstone* v. *Lochgelly Magistrates*, [1913] S. C. 1078.

(*l*) *M'Murray* v. *Glasgow School Board*, [1916] S. C. 9.

(*m*) *Hardie* v. *Sneddon*, [1917] S. C. 1.

(*n*) *Hardy* v. *Central London Ry. Co.*, [1920] 3 K. B. 459; 89 L. J. K. B. 1187.

(*o*) *M'Kenna* v. *Magistrates of Coatbridge*, [1924] S. C. 356.

(*p*) *Glasgow Corporation* v. *Taylor*, [1922] 1 A. C. 44; 91 L. J. P. C. 49.

(*q*) *Dungarvil Coal Co., Lim.* v. *M'Kinlay*, [1923] W. N. 35.

children were allowed to climb on a building in a ruinous state (*r*). Where the cause of injury is a nuisance, and the evidence is consistent with the child's injury having been brought about by his own negligent conduct and not by the nuisance, though strictly speaking the onus is on the child to prove absence of negligence, yet the want of such direct evidence will not debar him from recovering compensation for the injury (*s*). In one case it was decided that where the cause of injury was a nuisance, and the young child has only acted as it is natural to suppose he should act, the person who is responsible for the nuisance and injury to the child is liable to him in damages (*t*). If another child in no way concerned with the act of the first child which causes the mischief is injured by such act, it would be entitled to recover, though if he were a joint actor with him he would not (*u*). Where a child was injured by another child knocking over a pint of molten lead left unattended in a field to which children had access, it was held that the defendants were liable on the ground of nuisance (*x*). So, where the defendant exposed in a public place for sale, unfenced and without superintendence, a machine which might be set in motion by any passer-by, and which was dangerous when in motion, and the plaintiff, a boy four years old, by the direction of his brother, seven years old, placed his fingers within the machine whilst another boy was turning the handle which moved it, and his fingers were crushed, the plaintiff was held disentitled to maintain any action for the injury (*y*).

Infant Identified with the Adult in whose Charge he is.—An infant of tender years is so identified with the adult who has the charge and control of it that if it receives injuries under circumstances which disentitled the adult to recover, it will itself be unable to recover compensation (*z*); but where such adult is

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(*r*) *Boyd* v. *Glasgow Iron and Steel Co., Lim.*, [1923] S. C. 758.

(*s*) *Fenna* v. *Clare & Co.*, [1895] 1 Q. B. 199; 64 L. J. Q. B. 238.

(*t*) *Harrold* v. *Watney*, [1898] 2 Q. B. 320; 67 L. J. Q. B. 771.

(*u*) *Abbott* v. *Macfie*, 33 L. J. Ex. 177; *Mackenzie* v. *Fairfield Shipbuilding and Engineering Co., Lim.*, 50 Sc. L. R. 79; *Latham* v. *R. Johnson, Lim.*, [1913] 1 K. B. 398; 82 L. J. K. B. 258.

(*x*) *Crane* v. *South Suburban Gas Co.*, [1916] 1 K. B. 33; 85 L. J. K. B. 172.

(*y*) *Mangan* v. *Atterton*, L. R. 1 Ex. 239; 35 L. J. Ex. 161; but see *Clark* v. *Chambers*, 3 Q. B. D. 327; 47 L. J. Q. B. 427.

(*z*) *Waite* v. *North-Eastern Railway Co.*, 28 L. J. Q. B. 258. Though Lord Bramwell disapproved of the decision in this case in *Mills* v. *Armstrong*, 13 App. Cas. 1; 57 L. J. P. 65, in which he prepared a speech but did not deliver it, yet the other members of the House of Lords thought this case was

guilty of a mere default or mistake in respect of the infant, which if happening in his own case would not disentitle him to recover, then the infant may recover compensation for injuries notwithstanding such default or mistake (*a*).

Damages.—Where an infant sues for damages for personal injuries, he cannot include a claim for the expenses paid by his parents for his cure; though if they had come out of his own funds, he might so include them (*b*), otherwise it is necessary that the parent incurring the expenditure shall be joined as a party in respect of such claim.

Statutory Protection.—Several statutes have been passed for what may be termed the moral, social, and physical protection of young children, some of which will be shortly summarized in the following pages.

Dangerous Performances Acts, 1879 and 1897.—In order to prevent the lives of children of tender years being risked in dangerous performances, it has been provided by the Acts to regulate the employment of children in places of public entertainment in certain places (*c*), that any person who shall cause any male child under the age of sixteen, and any female child under the age of eighteen (*d*), to take part in any dangerous performances, and the parent or guardian or person having the custody of such child who shall aid and abet the same, may be summarily convicted and fined in a penalty not exceeding £10 (*e*). But any prosecution under these Acts must first be sanctioned by the chief of the police of the area in which the alleged offence is committed (*f*).

Criminal Law (Amendment) Acts, 1885 and 1892.—The Criminal Law (Amendment) Act, 1885 (*g*), was passed for the purpose of extending the protection of the law over young girls. Carnal knowledge of a girl under thirteen is a felony (*h*); and the attempt to have such carnal knowledge is a misdemeanour (*i*). The carnal knowledge or attempt to have carnal knowledge of a girl above thirteen and under sixteen is a misdemeanour (*k*).

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distinguishable from that of *Thorogood* v. *Bryan* (8 C. B. 115; 18 L. J. C. P. 336) which they overruled.

(*a*) *Austin* v. *Great Western Railway Co.*, L. R. 2 Q. B. 442; 36 L. J. Q. B. 201.

(*b*) *Collins* v. *Lefevre*, 1 F. & F. 436.

(*c*) 42 & 43 Vict. c. 34, and 60 & 61 Vict. c. 52.

(*d*) 60 & 61 Vict. c. 52, s. 1.

(*e*) 42 & 43 Vict. c. 34, s. 3.

(*f*) 60 & 61 Vict. c. 52, s. 2.

(*g*) 48 & 49 Vict. c. 69.

(*h*) Sect. 4.

(*i*) *Ibid.*

(*k*) Sect. 5.

It is no longer a defence to a charge of this offence that the accused had reasonable cause to believe the girl was over the age of sixteen, except in the case of a first charge against a man aged twenty-three or under (*l*). The question of reasonable cause is a question for the jury (*m*). The defence is not available on a charge of indecent assault. Any householder who permits on his premises the defilement of a girl under thirteen is guilty of a felony (*n*), and of a girl between thirteen and sixteen of a misdemeanour (*o*); this is equally the case where the girl is his own daughter (*p*). The abduction of a girl under eighteen for the purpose of being carnally known is a misdemeanour (*q*). It is a defence to a charge of this offence that the accused had reasonable cause to believe the girl was of or above the age of eighteen (*r*). Any house in which it is reasonably suspected that a girl under eighteen is detained (and if over eighteen against her will) for immoral purposes may be searched, and if the girl is found there she may be delivered up to such person as the Court may think fit (*s*).

Coal Mines Act, 1911.—Under the Coal Mines Act, 1911 (*t*), no girl or woman of any age, and no boy under fourteen shall be employed in a mine below ground (*u*); and no boy or girl under thirteen years of age shall be employed above ground for more than fifty-four hours in any week (*x*). No boy or girl under thirteen shall be so employed between nine o'clock at night and five on the following morning, nor on Sunday, nor after two o'clock on Saturday afternoon (*y*). No boy or girl of or above thirteen shall be employed for more than fifty-four hours in any one week or ten hours in any one day (*z*). No boy or girl shall be employed continuously for more than five hours without an interval of at least half-an-hour for a meal, nor for more than eight hours on any one day without an interval or intervals for meals amounting to not less than one hour and a half (*a*), nor be employed in moving waggons or in lifting or carrying or moving anything so heavy as to be likely to cause injury (*b*).

(*l*) Criminal Law Amendment Act, 1922, s. 2.
(*m*) *R.* v. *Forde*, [1923] 2 K. B. 400.
(*n*) 48 & 49 Vict. c. 69 s. 6.
(*o*) *Ibid.*
(*p*) *Reg.* v. *Webster*, 16 Q. B. D. 134; 55 L. J. M. C. 63.
(*q*) Sect. 7.
(*r*) *Ibid.*; *Reg.* v. *Packer*, 16 Cox, C. C. 57.
(*s*) Sect. 10.
(*t*) 1 & 2 Geo. V. c. 50.
(*u*) Sect. 91.
(*x*) Sect. 92.
(*y*) Sect. 92 (3).
(*z*) Sect. 92 (2).
(*a*) Sect. 92 (6).
(*b*) Sect. 92 (7).

Shops Act, 1912.—Under the Shops Act, 1912 (*c*), a young person, that is, one under eighteen (*d*), shall not be employed in or about a shop more than seventy-four hours a week, including meal-times (*e*). This provision does not apply to a person wholly employed as a domestic servant (*f*).

Betting and Loans (Infants) Act, 1892.—In order to protect young persons from the temptation and dangers of gambling and getting into debt the Betting and Loans (Infants) Act, 1892 (*g*), was passed, under which any person who for reward or profit sends any document to a person whom he knows to be an infant for the purpose of inciting him to bet (*h*), or to borrow money (*i*), shall be guilty of a misdemeanour. If an infant has contracted a loan which is void in law, and has agreed on attaining majority to pay money in respect of such loan, which is not a new advance, such agreement or negotiable security representing such agreement shall be void as against all persons (*k*).

Infant Life Insurance.—For the purpose of removing the temptation which undoubtedly exists in the case of many parents and others of making a profit out of the death of young children, and so causing them to be neglected, it is now provided by the Friendly Societies Act, 1924 (*l*), that no society, whether registered or unregistered, shall insure or pay on the death of a child under three years of age any sum of money which, added to any amount payable on the death of such child by any other society or branch, or by any trade union or industrial assurance company, exceeds £6, and in the case of a child under six years £10, or under ten years £15 (*m*). Such payment shall only be to the person who took out the policy or the personal representative, and only on the production of the registrar's certificate of the death of the child. Where there is no personal representative payment may be made to the next of kin who has incurred or undertaken to incur the funeral expenses (*n*). These provisions apply to assurances on infants' lives by Industrial Assurance Companies (*o*). Every proposal for insurance shall

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(*c*) 2 Geo. V. c. 3.
(*d*) Sect. 2 (1).
(*e*) *Ibid.* See *Hammond* v. *Pulsford*, [1895] 1 Q. B. 223; 64 L. J. M. C. 63; *Collman* v. *Roberts*, [1896] 1 Q. B. 457; 65 L. J. M. C. 63.
(*f*) Sect. 2 (6).
(*g*) 55 & 56 Vict. c. 4.
(*h*) Sect. 1.
(*i*) Sect. 2.
(*k*) Sect. 5.
(*l*) 14 & 15 Geo. V. c. 11, s. 1.
(*m*) Friendly Societies Act, 1924, s. 2 (1).
(*n*) Industrial Assurance Act, 1923, s. 4 (2).
(*o*) Sect. 4 (3).

contain a declaration by the person whose life is to be insured that the policy is to be taken out by and the premiums paid by him, except where the policy is on the life of a child under sixteen, or assures a payment for funeral expenses of parent, child, grand parent, grand child, brother or sister, or where there is an insurable interest in the life, and where there is an insurable interest the proposal must state the nature of that interest (*p*).

Infants Kept for Reward.—Where any person undertakes for reward the nursing and maintenance of one or more infants under the age of seven years apart from their parents or having no parents, he shall, within forty-eight hours from the reception of any such infant, give notice in writing thereof to the local authority, but only if the infant is received for more than forty-eight hours (*q*). The local authority must carry out this Act, and, if need be, appoint inspectors of either sex with power to enforce its provisions (*r*). The local authority may fix the number of infants under seven years old who may be received or retained in any dwelling-house (*s*). The inspectors may remove any infant who is kept under such circumstances as to endanger its health (*t*); and the death of such infant is to be notified within twenty-four hours to the coroner (*u*). Persons contravening the provisions of the Act are to be summarily dealt with (*x*); but the Act does not extend to the relatives or legal guardians of the infant, or to any person who has been appointed to receive such infants under the Poor Law or Local Government Board, or to hospitals, or convalescent homes or institutions established for the protection and care of infants, and conducted in good faith for religious or charitable purposes (*y*), or boarding schools at which efficient elementary education is provided. The local authority in the County of London is the County Council, in the City of London the Common Council, and in other places the Board of Guardians (*z*).

Employment of Children.—Under the provisions of the Education Act, 1921, a local education authority may make bye-laws (1) prescribing for all children under the age of fourteen, or for boys and girls under that age separately, and with respect to all occupations or to any specified occupation the

(*p*) Industrial Assurance Act, 1923, s. 20 (1).
(*q*) 8 Edw. VII. c. 67, s. 1.
(*r*) Sect. 2 (1).
(*s*) Sect. 4.
(*t*) Sect. 5.
(*u*) Sect. 6.
(*x*) Sect. 8.
(*y*) Sect. 11.
(*z*) Sect. 10 (1).

age below which employment is illegal, the hours between which employment is illegal, and the number of daily and weekly hours beyond which employment is illegal; (2) prohibiting absolutely or permitting, subject to conditions, the employment of children under the age of fourteen in any specified occupation (*a*). A local education authority may make bye-laws with respect to street trading by children and young persons under the age of sixteen years (*b*). The Act also imposes general restrictions on the employment of children. No child under twelve shall be employed, and limitations as to hours and the nature of the work done are imposed in the case of children between twelve and fourteen (*c*). The local education authority may also require the suspension of employment of scholars under obligation to attend continuation schools (*d*). Any person taking a child into his employment, or his agent or workman doing so, in contravention of the Act, or of any bye-law made thereunder, is liable to a penalty (*e*).

Intoxicating Liquors (Sale to Children) Act, 1901. The Intoxicating Liquors (Sale to Children) Act, 1901 (*f*), makes it an offence for every holder of a licence knowingly to sell or deliver, or allow any person to sell or deliver (save at the residence or working-place of the purchaser) any description of intoxicating liquor to a child under the age of fourteen years for consumption by any person on or off the premises, except such liquor is sold or delivered in corked (*g*), and sealed (*h*) vessels in quantities not less than one reputed pint for consumption off the premises only (*i*). An honest belief in the compliance with the requirements of this Act is no excuse or defence if, as a fact, there has been non-compliance with them (*k*); but on the other hand such non-compliance on the part of a servant of the licence-holder in direct contravention of his express orders does not render the licence-holder guilty of the offence of knowingly

(*a*) 11 & 12 Geo. V. c. 51, s. 90.
(*b*) Sect. 91.
(*c*) Sect. 92.
(*d*) Sect. 93.
(*e*) Sects. 96, 97.
(*f*) 1 Edw. VII. c. 27, repealing the like Act of 1886 (49 & 50 Vict. c. 56).
(*g*) "Corked" means closed with a plug or stopper, whether of cork, wood, glass or other material. Sect. 5.
(*h*) "Sealed" means secured with any substance without the destruction of which the cork plug or stopper cannot be withdrawn. Sect. 5. For what is "destruction" within this section, see *Mitchell* v. *Crawshaw*, [1903] 1 K. B. 701; 72 L. J. K. B. 389; and for what is "not destruction," see *Macey* v. *McKenzie*, 88 L. T. 631; 67 J. P. 251.
(*i*) Sect. 2.
(*k*) *Brooks* v. *Mason*, [1902] 2 K. B. 743; 72 L. J. K. B. 19.

allowing such contravention (*l*). It is also an offence to send a child under fourteen years of age to any place where intoxicating liquors are sold, delivered, or distributed for the purpose of obtaining any description of intoxicating liquor except in corked or sealed vessels in quantities not less than a reputed pint for consumption by any person off the premises (*m*). This section is directed against parents and those who have the care and custody of young children. A licence-holder, however, is allowed to employ a member of his family or his servant or apprentice (though under fourteen years of age) as a messenger to deliver intoxicating liquors (*n*).

Children Act, 1908.—Any person giving intoxicating liquors to any child under the age of five except upon medical orders or in case of sickness or apprehended sickness is liable to a fine not exceeding £3 (*o*), and a licence-holder is liable to a fine if he allows a child under the age of fourteen to be in the bar of licensed premises except during closing hours. The offence is deemed to be committed unless he shows that he has used due diligence to prevent admission, or the child is apparently over the age of fourteen (*p*).

Factory and Workshop Act, 1901.—Under the Factory and Workshop Act, 1901 (*q*), no child or young person is allowed to work at certain dangerous trades (*r*); young persons (*s*) and children (*t*) are not allowed to work more than a certain number of hours per week in textile factories, including lace factories (*u*) and laundries (*v*), and a certain number of hours in non-textile factories (*x*), including bakehouses (*y*). Restrictions are put on the employment of children outside and inside a factory on the same day (*z*); also on Sundays (*a*); except in certain cases by special order (*b*); and in the case of Jews (*c*).

(*l*) *Emary* v. *Nolloth*, [1903] 2 K. B. 264; 72 L. J. K. B. 620; *Groom* v. *Grimes*, 89 L. T. 129; 67 J. P. 345.
(*m*) Sect. 2.
(*n*) Sect. 3.
(*o*) 8 Edw. VII. c. 67, s. 119.
(*p*) Sect. 120.
(*q*) 1 Edw. VII. c. 22.
(*r*) Sect. 77 (1).
(*s*) Sects. 24, 28 and 39.
(*t*) Sects. 25, 28 and 39.
(*u*) Sect. 37.
(*v*) Sect. 103. *Sadler* v. *Roberts*, 75 J. P. 342.
(*x*) *Vines* v. *Inglis*, [1915] S. C. (J.) 18.
(*y*) Sect. 38.
(*z*) Sect. 31.
(*a*) Sect. 34.
(*b*) Sect. 42, in the case of creameries.
(*c*) Sect. 48. In the case of Jews the factory or workshop must be closed on Saturdays to permit of Sunday labour.

A child or young person is not allowed to clean machinery in motion (*d*). Provision is made for the holidays of young persons and children (*e*). A male over fourteen years of age may be employed in night work in certain trades under proper restrictions (*f*). The age of young children employed in factories has been raised from eleven to twelve years of age (*g*) and the fitness of a child and young person for work must be certified (*h*). The Employment of Women, Young Persons and Children Act, 1920, raises the age to fourteen, so far as industrial undertakings are concerned, and employment in ships, with the exception of training ships, and vessels upon which only members of the same family are employed (*i*). A young person employed in a factory is not allowed to do work or be employed during prohibited hours, even though he does it for his own amusement and contrary to orders (*k*).

A child who is employed in a factory or workshop must attend some recognized efficient school, and non-attendance on the requisite number of times in one week must be made up in the successive week before the employment is resumed (*l*). A child over thirteen years of age who has obtained an educational certificate is to be deemed "a young person" (*m*). No young person or child shall be employed in any dangerous or unhealthy trade (*n*). The employment of a young person or child contrary to the provisions of the Act renders the employer (*o*) and the parent (*p*) liable to a fine on summary conviction (*q*). The Interpretation Clause of the Act (*r*) defines a "child" as a person who is under the age of fourteen years, and who has not, being of the age of thirteen years, obtained the statutory certificate of proficiency at school; a "parent" as a parent or guardian of or person having the legal custody or control over, or having direct benefit from the wages of a young person or child; a "young person" as a person who has ceased to be a

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(*d*) Sect. 13. *Pearson* v. *Belgian Mills Co.*, [1896] 1 Q. B. 244; 65 L. J. M. C. 48; *Taylor* v. *Mark Dawson & Son, Lim.*, [1911] 1 K. B. 145; 80 L. J. K. B. 102.
(*e*) Sect. 35.
(*f*) Sects. 54, 55 and 56.
(*g*) Sect. 62.
(*h*) Sects. 63—67 and 89.
(*i*) 10 & 11 Geo. V. c. 65, s. 1.
(*k*) See *Prior* v. *Slaithwaite Spinning Co.*, [1898] 1 Q. B. 881; 67 L. J. Q. B. 615.
(*l*) Sect. 68.
(*m*) Sect. 71.
(*n*) Sects. 76 and 77.
(*o*) Sect. 137.
(*p*) Sect. 138.
(*q*) Sect. 144.
(*r*) Sect. 156.

"child" and is under the age of eighteen years. Hotels are within this Act (*s*).

Licensing Act, 1902.—Under the Licensing Act, 1902 (*t*), it is now made an offence for a person in charge of a very young child to be drunk; and any person found drunk in a highway or other public place, whether a building or not, or on any licensed premises, while having charge of a child apparently under seven years of age may be summarily punished by a fine not exceeding forty shillings or imprisonment not exceeding one month (*u*).

Prevention of Cruelty to Children.—Under the Children Act, 1908 (*x*), any person over the age of sixteen years who has the custody, charge, or care of any child under the age of sixteen years, and who wilfully assaults, ill-treats, neglects, abandons, or exposes such child, or causes or procures such child to be assaulted, ill-treated, neglected, abandoned, or exposed in a manner likely to cause such child unnecessary suffering or injury to its health (including injury to or loss of sight or hearing or limb or organ of the body and any mental derangement) may, on conviction, be subjected to certain punishments (*y*). Any direct or indirect pecuniary gain arising from the death of the child may subject an offender under this Act to a heavier punishment (*z*). Pending the hearing of a charge of an offence under this Act and certain scheduled offences, provision is made for the detention of the child in some place of safety (*a*). After the conviction or committal of an offender the Court may take the child out of the custody, charge, or care of the offender, and commit it to the custody of a relation or some fit person till it attains the age of sixteen years or any shorter period (*b*); and the committee of such child is to have full parental control over it, and be responsible for its maintenance even as against

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(*s*) *Savoy Hotel Co.* v. *London County Council*, [1900] 1 Q. B. 665; 69 L. J. Q. B. 274. In this case a page boy was held not to be a person wholly employed as a domestic servant. For what is not a "shop," see *Smith* v. *Kyle*, [1902] 1 K. B. 286; 71 L. J. K. B. 16.

(*t*) 2 Edw. VII. c. 28.

(*u*) Sect. 2. Under this section if a child appears to be under seven years of age, it shall be deemed to be so unless the contrary is proved.

(*x*) 8 Edw. VII. c. 67.

(*y*) Sect. 12. A conviction under this section may take place though the child has died; and conversely, on an indictment for manslaughter, the jury may convict of an offence under this section. For what evidence is admissible to prove the child's age, see *Reg.* v. *Cox*, [1898] 1 Q. B. 179; 67 L. J. Q. B. 293.

(*z*) Sect. 12 (6).

(*a*) Sect. 20 (3).

(*b*) Sect. 21 (1).

the claims of the parent (*c*). The committee should be, if possible, of the same religious persuasion as the child, or should give an undertaking to bring up the child in its religious persuasion (*d*). This power of committing a child to the custody of a relative or other named person may be exercised by the Court when a child under sixteen years of age is brought before it under circumstances which would authorize it to send the child to an industrial school (*e*). A warrant may be granted to search for or remove a child where there is reasonable ground for believing that an offence under this Act has been committed against it (*f*).

SECTION 2.

Protection as Regards Property.

Statutes of Limitations.—An infant being a person under disability is to a large extent excepted from the effect of the Statutes of Limitations, the operation of which is to effect the creation of new titles and rights of property, or the deprivation of the right to enforce valid claims. These statutes will be shortly discussed as to their effect on (a) real property; (b) personal property; (c) personal injuries or torts.

Real Property.—By force of 3 & 4 Wm. IV. c. 27, and 37 & 38 Vict. c. 57, in the case of persons under no disability, no land or rent is recoverable but within twelve years (or six years in certain cases (*g*)) after the right of action has accrued to the person who brings the action or to some person through whom he claims (*h*). But if such right is in an infant then he or the person claiming through him, notwithstanding the expiry of such period of twelve or six years (as the case may be) may enforce it at any time within six years next after he shall have ceased to be under disability (*i*). But the disability of infancy does not prevent the statutes from running against an infant where the person in whose favour it is running went into and obtained possession of the property at a time when the owner was under no disability; and this is so where the infant's title is equitable (*k*).

(*c*) Sect. 22 (1).
(*d*) Sect. 23 (1).
(*e*) Sect. 107.
(*f*) Sect. 20 (1).
(*g*) See 37 & 38 Vict. c. 57, s. 2.
(*h*) *Ibid.* s. 1.
(*i*) *Ibid.* s. 3.
(*k*) *Murray* v. *Watkins*, 82 L. T. 796; *Garner* v. *Wingrove*, [1905] 2 Ch. 233; 74 L. J. Ch. 545.

Easements.—The period of time in which an easement may now be acquired is twenty years; but if during such period the person against whom the easement is claimed is an infant, such period of infancy shall be excluded in computing the twenty years (*l*); but if the easement has been uninterruptedly enjoyed for thirty years, then the right to it is indefeasible notwithstanding any disability in the owner of the servient tenement during the thirty years (*m*). The same principle applies to claims of profit *à prendre*; only the periods of acquisition and indefeasibility are forty and sixty years respectively (*n*). An indefeasible claim to the easement of light may be obtained in twenty years (*o*).

Possession of Stranger.—As a rule, where a stranger enters upon land, or gets possession of property belonging to an infant, the latter is entitled to treat him as a bailiff or trustee, so that his uninterrupted possession does not mature into a title, or bar the infant's remedy (*p*), and the latter may obtain an account of the rents and profits and a decree for possession (*q*).

Account for Mesne Profits.—The account for mesne profits to which the infant is entitled (*r*) is not limited to the period of the previous six years, for the Statute of Limitations does not run against him (*s*); though if the infant allow more than six years to elapse after attaining majority his right to such an account will be barred (*t*).

Recovery of Land.—There is, however, a distinction to be drawn so far as regards bringing an action for the recovery of land between possession by an actual stranger and one who is the parent or legal guardian of an infant, or one who is so connected with the infant by relationship or otherwise, as to have the duty imposed upon him of protecting, or, at any rate, not prejudicing, the infant's rights. In the first case the stranger would not be treated as such bailiff or trustee, whereas the parent or guardian would be so treated (*u*).

(*l*) 2 & 3 Wm. IV. c. 71, s. 7.
(*m*) *Ibid.*
(*n*) Sects. 1 and 7.
(*o*) Sect. 3.
(*p*) *Smyth* v. *Byrne*, [1914] 1 Ir. R. 53.
(*q*) See *Dormer* v. *Fortescue*, 3 Atk. 124, and *Wall* v. *Stanwick*, 34 Ch. D. 763; 56 L. J. Ch. 501. In this case, Kekewich, J., held that it was a legal presumption (if circumstances required it) that when a person is in occupation of an infant's property, he is in as the infant's bailiff; that is, when it is proper to make him accountable for the rents and profits of the infant's estate, and he cannot be shown to be in any other capacity.
(*r*) *Bennet* v. *Whitehead*, 2 P. Wms. 644.
(*s*) *Nanney* v. *Williams*, 22 Beav. 452.
(*t*) *Lockey* v. *Lockey*, Prec. Ch. 518.
(*u*) *Thomas* v. *Thomas*, 25 L. J. Ch. 159.

This difference is material as regards the time within which the infant could assert his rights. Thus, "where a father is in possession of an estate belonging to an infant child, he will, under ordinary circumstances, be presumed to have entered on it as his guardian or bailiff, and such possession during the infancy is one on which the statute will not operate, and the entry on and possession of an infant's estate by others than his father may be made and retained under such circumstances as to make the same rule applicable to such entry and possession (*x*). And where the person so held to be guardian or bailiff continues in possession after the infancy has ceased, he is supposed to continue in possession in the same character as before, unless something is done to change the character of the possession; and the statutes will not run even after the infancy has ceased until the character of the possession is changed (*y*). Under ordinary circumstances, if the person in possession is a stranger, the infant cannot bring his action to recover the land after six years from the date of his majority, when his disability ceased (*z*), in the absence of some acknowledgment (*a*).

Personal Property.—The time within which an action must be brought to enforce a claim founded on debt is six years (*b*); if, however, any person entitled to bring such action is an infant at the time of the accrual of the right he may bring his action within six years after attaining his majority (*c*). If the person so entitled dies under age his personal representative would be entitled to bring the action within six years from the death (*d*). Though an action to recover money secured by mortgage, judgment, or lien, or otherwise charged upon or payable out of land or rent, must be brought within twelve years next after the right to receive it accrued, an infant has twelve years from the time of attaining his majority within which to bring any such action (*e*).

Personal Injuries or Torts.—The time within which an action must be brought to enforce a claim founded on trespass, detinue and replevin for goods and chattels, and on trespass *quare*

(*x*) *Pelly* v. *Bascombe*, 11 W. R. 766.
(*y*) Darb. & Bos. Stat. Lim. 394, 395. See *Re Hobbs*, *Hobbs* v. *Wade*, 36 Ch. D. 553; 57 L. J. Ch. 184.
(*z*) 37 & 38 Vict. c. 57, s. 3; and see *Thomas* v. *Thomas* (*ubi sup.*).
(*a*) *McMahon* v. *Hastings*, [1913] 1 Ir. R. 395.
(*b*) 21 Jac. I. c. 16, s. 3.
(*c*) Sect. 7.
(*d*) See *Townsend* v. *Deacon*, 18 L. J. Ex. 298.
(*e*) 37 & 38 Vict. c. 57, s. 8. See *Sutton* v. *Sutton*, 22 Ch. D. 511; 52 L. J. Ch. 333.

clausum fregit is six years (*f*); an action founded on trespass, assault, battery, wounding, or imprisonment must be brought within four years from the accrual of the right to bring such action; and an action founded on slander must be brought within two years next after the words spoken (*g*). If, however, any person entitled to bring any of the above actions is an infant at the time of the accrual of the right, he may bring his action within the before-limited times after attaining his majority (*h*). If the person entitled dies under age his personal representative would be able to bring the action within the above-mentioned periods from the death (*i*). Purely personal actions would of course die with his death. The Court will take the tenderest care of the interests of infants, and in cases of difficulty and doubt will always grant an order that the property in which they are interested shall be administered under its supervision (*k*). But such order will not now be granted as of course at the expense of the estate because a party to the suit is an infant (*l*).

National Debt Act, 1892.—Where an infant is the sole survivor in an account, or holds stock jointly with a person under legal disability, or where stock has by mistake been bought in or transferred into the sole name of an infant, the Bank of England may, at the request in writing of the parent, guardian, or next friend of the infant, receive the dividends and apply them to the purchase of like stock, and the stock so purchased shall be added to the original investment (*m*).

Protection Extended Beyond Infancy.—Even after the infant has attained twenty-one, the Court will protect him from binding his interests, if any attempt is shown to derive advantage from his ignorance or inexperience (*n*); or where undue influence is brought to bear upon him (*o*).

(*f*) 21 Jac. I. c. 16, s. 3.
(*g*) *Ibid.*
(*h*) Sect. 7.
(*i*) See *Townsend* v. *Deacon*, 18 L. J. Ex. 298.
(*k*) *Re Wilson, Alexander* v. *Calder*, 28 Ch. D. 457; 54 L. J. Ch. 487; Ord. LV. r. 10.
(*l*) *Re Blake, Jones* v. *Blake*, 29 Ch. D. 913; 54 L. J. Ch. 880.
(*m*) 55 & 56 Vict. c. 39, s. 3.
(*n*) *Grosvenor* v. *Sherratt*, 28 Beav. 659.
(*o*) *Smith* v. *Kay*, 30 L. J. Ch. 45. See *ante*, pp. 563 *et seq.*

CHAPTER VII.

ACTIONS BY AND AGAINST INFANTS.

SECTION 1.

Actions by Infants.

Actions at Law.—As an infant is legally lacking in discretion, and is unable to render himself liable to the costs of an action, he is incapable of bringing an action without the assistance of some person who may be responsible to the Court for the propriety of the suit in its institution and progress. When an infant becomes a plaintiff, the process is sued out in his name, but some person of full age must conduct it for him (*a*). This person used to be styled in common law suits the "*prochein amy*," but now the Chancery designation of "next friend" is employed both in common law and equity actions. There is now no distinction between the common law and Chancery method of commencing actions, for the latter practice is to prevail (*b*).

In Equity. The Courts of equity always required that an infant should sue by his next friend, in order that there might be some one who would be responsible for the costs incurred; but an infant's next friend is not bound to give security for costs (*c*). Where, however, he is insolvent and seeks to appeal, then he must give security for the costs of the appeal (*d*). It seems that the defendant may waive his right to have a next friend appointed as security for his costs (*e*). The next friend is required not only in actions, but in petitions (*f*), motions, and all other applications (*g*). In matters relating merely to pro-

(*a*) *Hunter* v. *Westbrook*, 2 C. & P. 578; *Rex* v. *Chillesford*, 4 B. & C. 94.

(*b*) Judicature Act, 1873, Ord. XVI. r. 8; Rules of the Supreme Court, 1883, Ord. XVI. r. 16. "Infants may sue as plaintiffs by their next friends, in the manner heretofore practised in the Chancery Division."

(*c*) *Hind* v. *Whitmore*, 2 K. & J. 458; Set. Judg. & Ord. 824.

(*d*) *Swain* v. *Follows*, 18 Q. B. D. 585; 56 L. J. Q. B. 310; R. S. C. Ord. LVII. r. 15.

(*e*) *Ex parte Brocklebank*, *Re Brocklebank*, 6 Ch. D. 358; 46 L. J. Bk. 113.

(*f*) *Jones* v. *Lewis*, 1 De G. & S. 245.

(*g*) *Cox* v. *Wright*, 9 Jur. (N.S.) 981.

cedure or to the conduct of the cause, the next friend or guardian is competent to act so as to bind the infant without obtaining an order of the Court (*h*). A suit may be brought by an infant *en ventre sa mere* (*i*).

Action is at the Suit of the Infant. The action when brought is at the suit of the infant, and not that of the next friend (*k*), though if an action is commenced on behalf of an infant without a next friend, the defendant may move to have it dismissed with costs to be paid by the solicitor (*l*). But where an action has been commenced by the plaintiff as an adult, and the defendant subsequently discovers that he is an infant, the former may be allowed to amend by inserting a next friend (*m*). So where an infant is made a co-plaintiff without proper authority, the solicitor who wrongly joins him may be ordered to pay the costs of such improper joinder (*n*).

In forma pauperis.—An infant, broadly speaking, cannot sue by next friend *in forma pauperis* (*o*); but where he is so circumstanced that he can only obtain a pauper as next friend, and a special application is made on his behalf, it seems that he might be allowed to sue by such next friend *in forma pauperis* (*p*), or now as a poor person.

Discovery.—Under the Rules of the Supreme Court (*q*) discovery, whether of documents or by way of interrogatories, may be had against infant plaintiffs and defendants, and against their next friends and guardians *ad litem*.

Arbitration.—An infant cannot validly bind himself to refer his cause or action to arbitration (*r*) and the Court would not seem to have any power under the Arbitration Act, 1889 (*s*), to refer a cause or matter or question in dispute unless all the parties to it are under no disability. If any matter in dispute

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(*h*) *Knatchbull* v. *Fowle*, 1 Ch. D. 604. Ord. xvi. r. 21, provides that in all causes or matters to which an infant is a party, any consent as to the mode of taking evidence, or as to any other procedure, shall, if given with the consent of the Court or a judge by the next friend or guardian of the person under disability, have the same force and effect as if such party were under no disability, and had given such consent.

(*i*) See *Wallis* v. *Hodson*, 2 Atk. 114, 117; *Robinson* v. *Litton*, 3 Atk. 209, 211.

(*k*) *Flight* v. *Bolland*, 4 Russ. 298.

(*l*) Dan. Ch. Pr. 106.

(*m*) *Ibid.*; *Flight* v. *Bolland* (*ubi sup.*).

(*n*) *Geilinger* v. *Gibbs*, [1897] 1 Ch. 479; 66 L. J. Ch. 230.

(*o*) *Anon.*, 1 Ves. 409; *Fernée* v. *Gorlitz*, [1914] 1 Ch. 177; 84 L. J. Ch. 404.

(*p*) *Lindsay* v. *Tyrrell*, 2 De G. & J. 7.

(*q*) Ord. xxxi. r. 29.

(*r*) See *Biddle* v. *Dowse*, 6 B. & C. 255.

(*s*) 52 & 53 Vict. c. 49, s. 14.

has been referred by him to arbitration, it is clear that his death before the award revokes the submission (*t*). After an award it is too late for an adult party who was aware that the other party was an infant to object to the award on the ground of the infancy of the other party (*u*). No special case in any cause or matter to which an infant is a party shall be set down for argument without leave of the Court or a judge, the application for which must be supported by sufficient evidence that the statements contained in the special case, so far as they affect the interest of the infant, are true (*x*). If after a special case affecting property belonging to certain infants is filed, another child in the same interest as the other infants is born, the latter infant need not be made a party (*y*).

Who may be Next Friend.—The Court is not obliged to accept any and every person as the next friend of an infant. The nearest relative of the infant is supposed to be the person who will take the infant under his protection (when circumstances require it), and prosecute an action for the assertion of his rights, or the redress of his wrongs. The Court will permit any person to institute suits on behalf of an infant, and whoever thus acts the part which the nearest relation ought to take is styled the next friend of the infant. The father, however, is the natural guardian of his children, and if not adversely interested or otherwise disqualified, has a paramount vested right to be appointed their next friend in substitution for a stranger, who, without communicating with him, has constituted himself their next friend and commenced an action on their behalf (*z*). In the absence of the father the testamentary guardian is the proper person.

The next friend should not be a defendant, or a person whose interests conflict with those of the infant (*a*); nor can he be a receiver in the cause (*b*). He ought to be an independent person and in no way connected with, or a mere nominee of, the defendant; and if he is so connected, he will be removed, though as regards his personal character and pecuniary position he would be a fit person (*c*). The personal incapacity of a married

(*t*) See *Bristow* v. *Binns*, 3 D. & R. 184.
(*u*) *Wrightson* v. *Bywater*, 3 M. & W. 199; *Bowyer* v. *Blorksidge*, 3 Lev. 17.
(*x*) R. S. C. Ord. XXXIV. r. 4.
(*y*) *Palmer* v. *Flower*, L. R. 13 Eq. 250; 41 L. J. Ch. 193.
(*z*) Dan. Ch. Pr. 106; *Woolf* v. *Pemberton*, 6 Ch. D. 19.
(*a*) *Lewis* v. *Nobbs*, 8 Ch. D. 591; 47 L. J. Ch. 662.
(*b*) *Stone* v. *Wishart*, 2 Madd. 64; *Re Lloyd, Allen* v. *Lloyd*, 12 Ch. D. 447.
(*c*) *Re Burgess, Burgess* v. *Bottomley*, 25 Ch. D. 243.

woman to act as a next friend seems not to be removed (*d*); and an infant cannot act as next friend (*e*). As the next friend is not a party to a cause or action it would seem that the provision of Order xvii. Rule 1, of the Rules of the Supreme Court against the abatement of such cause or action by the marriage of a party to it does not apply to the case of a female next friend who marries; consequently the old practice would prevail, and the suit would be deemed to have abated; and the infant would require to have a new next friend, and must apply by summons for an order to add a new next friend (*f*); and on the failure of the infant to do so, the defendant might obtain an order that the action be dismissed (*g*).

Costs of Next Friend.—The Court is anxious not to discourage suits on behalf of an infant, although it will restrain them if it thinks them improper (*h*). The Court will, whenever it can be done, allow the next friend the costs out of the infant's estate of any proceeding instituted by him on behalf of the infant, even though unsuccessful, if undertaken *bona fide* (*i*).

Authority must be in Writing.—Before the name of any person shall be used in any action as next friend of any infant, such person shall sign a written authority to the solicitor for that purpose (*k*). But if his name be used without his consent, it will be struck out on his application (*l*).

Duty of Next Friend.—The next friend is not entitled to be heard in person (*m*), though he has the conduct of the action in his power, and whatever he does must be for the benefit of the infant. It is his duty to conduct the action to an issue. He cannot make a compromise which is not for the benefit of the infant (*n*); if there is an offer of a reasonable compromise his safest course is to bring the matter before the Court in order to obtain its approval and sanction of the compromise. But the

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(*d*) *Re Duke of Somerset, Thynne* v. *St. Maur*, 34 Ch. D. 465; 56 L. J. Ch. 733.

(*e*) *Fernée* v. *Gorlitz*, [1914] 1 Ch. 177; 84 L. J. Ch. 404.

(*f*) Ord. xvi. r. 11.

(*g*) *Crispe* v. *Braddy*, 9 L. J. Ch. 108.

(*h*) *Fellows* v. *Barrett*, 1 Keen, 119; *Murrell* v. *Chapman*, 8 Sim. 74; and see *Pennington* v. *Alvin*, 1 Sim. & St. 264.

(*i*) *Staines* v. *Maddox*, Mos. 319; *Pritchard* v. *Roberts*, L. R. 17 Eq. 222; 43 L. J. Ch. 129; Dan. Ch. Pr. 115.

(*k*) R. S. C. 1883, Ord. xvi. r. 20. This authority is to be filed in the Central Office, or in the District Registry, if the cause or matter is proceeding therein.

(*l*) *Ward* v. *Ward*, 6 Beav. 251.

(*m*) *Murray* v. *Sitwell*, [1902] W. N. 119; 32 L. J. N. C. 333; *Re Berry*, [1903] W. N. 125.

(*n*) *Rhodes* v. *Swithinbank*, 22 Q. B. D. 577; 58 L. J. Q. B. 287.

Court has no jurisdiction to force a compromise on him on behalf of the infant (*o*).

Inquiry as to whether Suit Beneficial.—Though the Court favours the bringing of suits on behalf of infants, it will yet check any tendency to bring actions which are clearly not for their benefit. Where a suit has been commenced on behalf of an infant, under circumstances raising a strong suspicion against the motives of the next friend, the Court will direct an inquiry whether the suit is for the benefit of the infant, and if so, whether such next friend is a proper person to conduct it, or otherwise, who is a proper person to be appointed next friend in his place (*p*). Where upon inquiry it appears that the action is not for the benefit of the infant, either the proceedings will be stayed, or else, if there is no excuse for the fact of the action having been instituted, it will be dismissed with costs to be paid by the next friend (*q*), and in a clear case even without an inquiry (*r*). The result of the cases seems to be that the Court exercises a very careful discretion on the one hand, in order to facilitate the proper exercise of the right which is given to all persons to bring an action on behalf of infants, and, on the other, to prevent any abuse of that right, and any wanton expense to the prejudice of infants (*s*). An application by the next friend of an infant for an inquiry as to whether a suit which he has himself instituted is for the infant's benefit will not be entertained, because the next friend, in commencing a suit, undertakes on his part that such suit is for the benefit of the infant (*t*); but this does not apply where the next friend *bona fide* applies for the purpose of ascertaining whether *another* suit which is pending by which the infant's property is subject to the control and disposition of the Court is more to the advantage and benefit of the infant (*u*).

Where more than one action for the same purpose has been instituted by different persons, each acting as the infant's next friend, the Court will, before judgment, direct an inquiry as to which suit is most for his benefit; and when that fact has been

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(*o*) *Re Birchall, Wilson* v. *Birchall*, 16 Ch. D. 41.

(*p*) *Nalder* v. *Hawkins*, 2 Myl. & K. 243; *Richardson* v. *Miller*, 1 Sim. 133; *Towsey* v. *Groves*, 32 L. J. Ch. 225; *Huxley* v. *Wootton*, [1912] W. N. 300.

(*q*) *Fox* v. *Suwerkrop*, 1 Beav. 583.

(*r*) *Sale* v. *Sale*, 1 Beav. 586; *Golds* v. *Kerr*, W. N. (Feb. 23, 1884), p. 46; *Huxley* v. *Wootton*, (*ubi sup.*); *Harrison* v. *O'Donnell*, [1919] W. N. 104.

(*s*) Dan. Ch. Pr. 108, 109, and the cases there cited.

(*t*) *Jones* v. *Powell*, 2 Mer. 141.

(*u*) *Taner* v. *Ivie*, 2 Ves. Sen. 466.

ascertained, it will stay proceedings in the other action or actions (*x*); and where the first is to be stayed, and the second prosecuted, the Court will give the first next friend his costs (*y*). The principle upon which the Court acts is to give a preference to that action which is capable from its nature and frame of being most beneficially and effectually prosecuted, though in point of form the relief sought by the other is more extensive (*z*). But where the merits of both suits are equal, then priority should prevail (*a*). Where more than one suit is being brought, then it is open to either or any of the next friends to make an application as to whether the suit commenced by him should or should not be prosecuted (*b*). Again, where the property of an infant is the subject of an action already depending, and it becomes necessary that another action should be brought on his behalf, it is usual before any steps are taken in it to obtain in chambers on summons an order sanctioning such contemplated proceedings as being for his benefit (*c*). If both suits are proper both may be allowed to proceed (*d*).

Inquiry as to Fitness of Next Friend.—An inquiry, if necessary, will be ordered to ascertain whether or not the person acting as the infant's next friend should continue so to act; and if the result of the inquiry proves his unfitness, the Court will not hesitate to remove him (*e*). The modern method of inquiry into the fitness of the next friend is by motion of which notice is given to the next friend (*f*).

Removal of Next Friend.—A next friend will be removed, if he have an interest in the suit adverse to the infant (*g*), or be an accounting party in the suit (*h*); or be so closely connected with a defendant having an adverse interest, that the infant's interest will probably not be protected (*i*); or if he will not proceed with the cause (*k*); or conducts it im-

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(*x*) *Mortimer* v. *West*, 1 Swanst. 358.
(*y*) *Starten* v. *Bartholomew*, 6 Beav. 143.
(*z*) *Campbell* v. *Campbell*, 2 Myl. & Cr. 25.
(*a*) *Ibid.*
(*b*) Dan. Ch. Pr. 110; and see *Taner* v. *Ivie*, 2 Ves. Sen. 466.
(*c*) Dan. Ch. Pr. 309; and see *Harrison* v. *Richards*, L. R. 1 Ch. App. 473.
(*d*) *Ashby* v. *Allen*,, 16 Jur. 460.
(*e*) Dan. Ch. Pr. 110; and see *Taner* v. *Ivie* (*ubi sup.*).
(*f*) Dan. Ch. Pr. 108 n. b; but see *Anderton* v. *Yates*, 5 De G. & S. 202, in which case there was a petition.
(*g*) *Gee* v. *Gee*, 12 W. R. 187.
(*h*) *Hopkinson* v. *Roe*, 9 L. J. Ch. (o.s.) 7.
(*i*) *Peyton* v. *Bond*, 1 Sim. 390; *Re Burgess*, *Burgess* v. *Bottomley*, 25 Ch. D. 243.
(*k*) *Ward* v. *Ward*, 3 Mer. 706.

properly (*l*). But he will not be removed merely on the ground of poverty (*m*); nor on grounds of suspicion, with no substantial case against his solvency, character, or conduct (*n*); nor merely because he is connected with the defendants, as by being clerk to their solicitor (*o*), if there is no probability that the infant's interest will be injuriously affected thereby (*p*), even if he be a stranger to the infant (*q*); and he will not be removed without being given an opportunity of explaining his conduct (*r*). But where the same solicitor acted for the next friend of the infant plaintiffs, and also for their father, who was a defendant, whose confidential solicitor he had been for years, it was held that he ought not to continue in the character of solicitor of the next friend (*s*). Unless there is some reason to the contrary in the interests of the infant, the father (*t*), and now the surviving mother (*u*), or a testamentary guardian (*x*), has the right to apply to remove the next friend and be substituted in his place.

Retirement of Next Friend.—When the next friend finds it necessary to retire from his office, he may apply to the Court to have another person substituted for him; and he will, as a rule, be permitted to retire on giving security to the defendant for the costs already incurred (*y*); but he cannot withdraw on his own motion without giving security for costs, if necessary (*z*). When once a person has commenced a suit as next friend he will not be removed unless the Court is informed of the circumstances and respectability of the party proposed to be substituted in his place; and that such person is not interested in the subject of the suit (*a*). But where the next friend of an infant plaintiff dies, his nearest paternal relations are entitled to nominate the new next friend; and in such a case no affidavit of fitness of the new next friend is required (*b*). This would also be the case

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(*l*) *Russell* v. *Sharpe*, 1 J. & W. 482.
(*m*) *Squirrel* v. *Squirrel*, 2 P. Wms. 297 n.
(*n*) *Smallwood* v. *Rutter*, 9 Ha. 24.
(*o*) *Lloyd* v. *Davies*, 10 Jur. (N.S.) 1041.
(*p*) *Sandford* v. *Sandford*, 9 Jur. (N.S.) 398.
(*q*) *Piffard* v. *Beeby*, 14 W. R. 948.
(*r*) *Re Corsellis, Lawton* v. *Elwes*, 50 L. T. 703.
(*s*) *Peyton* v. *Bond* (*ubi sup.*); *Re Burgess, Burgess* v. *Bottomley* (*ubi sup.*).
(*t*) *Woolf* v. *Pemberton*, 6 Ch. D. 19.
(*u*) Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27).
(*x*) *Hutchinson* v. *Norwood*, 31 Ch. D. 237; 55 L. J. Ch. 375.
(*y*) *Melling* v. *Melling*, 4 Madd. 261; *Davenport* v. *Davenport*, 1 Sim. & St. 101.
(*z*) *Melling* v. *Melling* (*ubi sup.*).
(*a*) *Harrison* v. *Harrison*, 5 Beav. 130.
(*b*) *Talbot* v. *Talbot*, L. R. 17 Eq. 347; 43 L. J. Ch. 352.

where the first next friend became incapacitated (*c*), or removed (*d*). Before appointing a person as a new next friend, the written authority of such person expressing his willingness to act in such capacity must be filed (*e*).

Election on Attaining Majority.—Where an infant sole plaintiff attains twenty-one, he may then elect whether to go on with or repudiate the suit that has been begun in his name. If he elect to continue the suit, it will be carried on in his name, and he becomes liable for the costs from the beginning, as though the suit had been begun by him as an adult (*f*); and his next friend should not take any further proceedings in the action in the plaintiff's name, though they might be consequential on proceedings taken anterior to his coming of age (*g*). If the infant repudiate the suit, he may obtain an order on motion or petition of course, on the payment of costs by himself, and the repudiation dates back from the beginning of the suit (*h*); but he cannot make the next friend pay the costs unless the suit is proved to be an improper one (*i*).

If the infant is a co-plaintiff, and on attaining twenty-one wishes to repudiate the suit, he should move on notice not to dismiss the suit, but to have his name struck out as plaintiff (*k*); and this by way of special application (*l*); but if the next friend requires it, the infant will be added as a defendant (*m*). If he fails to go on with the action, the defendant may move to dismiss it, but he cannot make the plaintiff pay the costs (*n*).

When the infant comes of age he cannot appear by a fresh solicitor, unless he has obtained an order to change solicitors (*o*).

Costs of Defendant.—If an action on behalf of an infant is dismissed, the defendant is entitled to his costs, just as though the suit had been brought against him by an adult, notwithstanding it may have been sanctioned by the Court (*p*). As

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(*c*) As to the capacity or incapacity of a married woman, see *Re Duke of Somerset, Thynne* v. *St. Maur*, 34 Ch. D. 465; 56 L. J. Ch. 733. See *ante*, p. 860.

(*d*) Dan. Ch. Pr. 112, which see for the proper proceedings to be taken on the death, removal, or incapacity of the next friend.

(*e*) Ord. XVI. r. 20, R. S. C. 1883.

(*f*) See *Bligh* v. *Tredgett*, 21 L. J. Ch. 204.

(*g*) *Brown* v. *Weatherhead*, 4 Ha. 122.

(*h*) *Dunn* v. *Dunn*, 7 De G. M. & G. 25; 24 L. J. Ch. 581.

(*i*) *Anon.*, 4 Madd. 461.

(*k*) *Acres* v. *Little*, 7 Sim. 138; *Cook* v. *Fryer*, 4 Beav. 13.

(*l*) *Ballard* v. *White*, 2 Ha. 158.

(*m*) *Bicknell* v. *Bicknell*, 8 L. T. 377.

(*n*) *Turner* v. *Turner*, 2 Stra. 708.

(*o*) See *Swift* v. *Grazebrook*, 13 Sim. 185.

(*p*) *Frank* v. *Mainwaring*, 4 Beav. 37.

against the defendant the next friend is liable to pay the costs of an unsuccessful suit or application (*q*). In a case, however, in which charges of misconduct were unsuccessfully made against a trustee, who at the same time was defending the trust estate, and the next friend was unable to pay the costs, the Court allowed the trustee's costs to be raised out of the estate (*r*). Costs as between the infant plaintiff and the defendant are generally given much upon the same principle as in suits by adult parties (*s*).

Recovery of Next Friend's Costs.—Costs as between the infant and his next friend are entirely in the discretion of the Court (*t*). *Prima facie* the next friend is entitled to recover costs against the infant (*u*), if the suit be a proper one, or for such part of it as is proper (*x*), and this is so even though the next friend have in fact taken a mistaken view (*y*), so that the suit is dismissed (*z*). But if the suit is unnecessary or improper, and the next friend might with reasonable care have known it to be so, he must pay the costs personally (*a*), and the same rule applies to any improper application in a suit (*b*). The next friend is entitled to his costs as between solicitor and client where the infant's fund is one in possession; but where it is in reversion only, then only as between party and party; and he must wait for his full costs until the fund or part of it comes into possession (*c*). The solicitor's lien for his costs and charges may be enforced against the late infant who adopts a suit after attaining his majority (*d*); but if the infant repudiate the suit then the solicitor has no lien on the deeds belonging to the infant which had been deposited by the defendant in the suit for inspection (*e*).

How Far Infant Bound.—An infant is in general bound by the acts of his solicitor (*f*), and is also usually bound by the effect of any action or proceedings instituted on his behalf and

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(*q*) *Buckley* v. *Puckeridge*, 1 Dick. 395.
(*r*) *Walters* v. *Woodbridge*, 7 Ch. D. 504; 47 L. J. Ch. 677.
(*s*) Macph. Inf. 393.
(*t*) *Clayton* v. *Clarke*, 3 De G. F. & J. 682.
(*u*) *Ibid.*; *Pritchard* v. *Roberts*, L. R. 17 Eq. 222; 43 L. J. Ch. 129.
(*x*) *Thompson* v. *Sheppard*, 2 Cox, Eq. Cas. 161.
(*y*) *Whittaker* v. *Marlar*, 1 Cox, Eq. Cas. 285.
(*z*) *Taner* v. *Ivie*, 2 Ves. Sen. 466.
(*a*) *Pearce* v. *Pearce*, 9 Ves. 548.
(*b*) Simp. Inf. 483; *Buckley* v. *Puckeridge* (*ubi sup.*).
(*c*) *Damant* v. *Hennell*, 33 Ch. D. 224.
(*d*) *Baile* v. *Baile*, L. R. 13 Eq. 497; 41 L. J. Ch. 300.
(*e*) *Dunn* v. *Dunn*, 24 L. J. Ch. 581.
(*f*) *Tillotson* v. *Hargrave*, 3 Madd. 495.

for his benefit; but if there has been any mistake in the form of such action, or in the proceedings under it, or in the conduct of them, the Court will upon application permit such mistake to be rectified (*g*). Also if the conduct of the next friend is not beneficial in regard to the interests of the infant the infant is not bound by it (*h*). An infant is not to suffer from the negligence or want of knowledge of the next friend, and he may impeach a judgment founded on error of fact, and is not required to adduce the usual evidence that the facts relied on for relief were not known and could not have been discovered with reasonable diligence (*i*).

Infant Plaintiff Born after Judgment.—Where the plaintiff in an action for administration refused to add infants in the judgment that had been pronounced before their birth, the defendants applied under Order xvii. Rule 4, to add the infants as parties, and obtained the order and the conduct of the case though they were themselves accounting parties (*k*).

Section 2.

Actions against Infants.

Guardian ad litem.—An infant cannot *in propria persona* appear to defend a suit brought against him any more than he can sue by himself; but as he was capable of being made a defendant in an action, a proper person was always appointed to defend on his behalf; and this person was called his guardian *ad litem*. Where an infant is a married woman, she must defend by her guardian *ad litem* (*l*). The guardian *ad litem* ought to be a fit and proper person who is not a mere volunteer, and a relative will be chosen in preference to a mere volunteer (*m*), but a co-defendant may be appointed; the Court prefers a competent person with no adverse interest, already a party (*n*). The plaintiff, or a married woman (*o*), or a person out of the jurisdiction cannot be appointed (*p*).

(*g*) Dan. Ch. Pr. 110.
(*h*) *Rhodes* v. *Swithinbank*, 22 Q. B. D. 577; 58 L. J. Q. B. 287.
(*i*) *Re Hoghton, Hoghton* v. *Fiddey*, L. R. 18 Eq. 573.
(*k*) *Wicks* v. *Wicks* (1887), W. N. 15.
(*l*) *Colman* v. *Northcote*, 7 Jur. 528.
(*m*) *Banfield* v. *Grant*, 11 W. R. 275.
(*n*) *Re Dawson, Johnston* v. *Hill*, 41 Ch. D. 415; 57 L. J. Ch. 1061.
(*o*) *Re Duke of Somerset, Thynne* v. *St. Maur*, 34 Ch. D. 465; 56 L. J. Ch. 733.
(*p*) Dan. Ch. Pr. 173.

Appearance by Guardian ad litem.—By the Rules of the Supreme Court, 1883, it is provided that "an infant shall not enter an appearance except by his guardian *ad litem*. No order for the appointment of such guardian shall be necessary, but the solicitor applying to enter such appearance shall make and file an affidavit in the Form No. 8 in Appendix A, Part II., with such variations as circumstances may require" (*q*). And "every infant served with a petition or notice of motion, or summons in a matter, shall appear on the hearing thereof by a guardian *ad litem* in all cases in which the appointment of a special guardian is not provided for. No order for the appointment of such guardian shall be necessary, but the solicitor by whom he appears shall previously make and file an affidavit as in the last rule mentioned" (*r*).

Service on Infant Defendant.—When an infant is a defendant to the action, service on his father or guardian, or if none, then upon the person with whom the infant resides or under whose care he is, shall, unless the Court or judge otherwise orders, be deemed good service on the infant; provided that the Court or judge may order that service made or to be made on the infant shall be deemed good service (*s*). Thus, where an infant resided with his mother and stepfather, and the notice was served at their house (*t*); and where the plaintiff was unable to discover where the infant's parents lived, and he served the notice at the head of the college of which the infant was an undergraduate (*u*), in each case the service was deemed sufficient. Where an infant is a member of a partnership, a judgment for goods supplied to the firm can only be recovered against the defendants "other than the infant partner"; and a receiving order against such a firm can only be made against the firm "other than the infant partner" (*x*).

Defence by Infant.—An infant may file a defence if it is to his interest to do so (*y*); and on attaining twenty-one he is entitled to put in a new defence (*z*); and if he take no further

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(*q*) Ord. XVI. r. 18.
(*r*) Ord. XVI. r. 19. Where he is interested as a bare trustee only, he must be served and a guardian *ad litem* appointed. *Re Adams*, 57 L. T. 337.
(*s*) Ord. IX. r. 4.
(*t*) *Hitch* v. *Wells*, 8 Beav. 576.
(*u*) *Christie* v. *Cameron*, 2 Jur. (N.S.) 635.
(*x*) *Lovell* v. *Beauchamp*, [1894] App. Cas. 607; 63 L. J. Q. B. 802.
(*y*) *Holden* v. *Hearn*, 1 Beav. 445.
(*z*) *Fawkner* v. *Watts*, 1 Atk. 407; Dan. Ch. Pr. 181.

step, his defence filed during minority will bind him by acquiescence after majority (*a*).

Default of Appearance by Infant.—Where the infant fails to enter an appearance, the plaintiff shall, before further proceeding with the action against the defendant, apply by motion to the Court or a judge for an order that some proper person be assigned guardian of such defendant, by whom he may appear and defend the action. But no such order shall be made unless it appears on the hearing of such application that the writ of summons was duly served, and that notice of the intended application was, after the expiration of the time allowed for appearance, and at least six clear days before the day in such notice named for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such writ of summons; or, where the infant does not reside with or under the care of his father or guardian, served upon or left at the dwelling-house of the father or guardian, if any, of such infant, unless the Court or judge at the time of hearing such application shall dispense with such last-mentioned service (*b*). If there has been a default in delivering a defence after the appointment of a guardian *ad litem*, or admissions are made in the defence, a motion for judgment may be made, but the statement of claim should be verified by affidavit (*c*). Where a plaintiff signs judgment for default of appearance the Court has entire discretion whether such judgment shall be set aside (*d*). In cases where the application for the appointment of a guardian is made at the instance of the plaintiff, the Official Solicitor is usually appointed (*e*). The Court provides for the costs of the latter by making the plaintiff pay them, who in his turn may add them to his own (*f*). It is the duty of the guardian to defend the action in the interests of the infant, and he will be held responsible for the propriety of its conduct (*g*); though he will not be rendered personally liable for costs, except in the case of gross misconduct (*h*).

(*a*) *Cecil* v. *Salisbury*, 2 Vern. 224; and see *Moneypenny* v. *Dering*, 4 De G. & J. 175.
(*b*) Ord. XIII. r. 1.
(*c*) *Cheek* v. *Cheek*, [1910] W. N. 87; 45 L. J. N. C. 222.
(*d*) *Furnival* v. *Brooke*, 49 L. T. 134.
(*e*) *Thomas* v. *Thomas*, 7 Beav. 47.
(*f*) *Harris* v. *Hamlyn*, 3 De G. & S. 470.
(*g*) Dan. Ch. Pr. 175.
(*h*) *Morgan* v. *Morgan*, 11 Jur. (N.S.) 233.

Where Infant out of the Jurisdiction.—Where an infant defendant is out of the jurisdiction, the notice of an application for the appointment of a guardian *ad litem* must be served on the parent or guardian of such infant (*i*); and where the foreign guardian refuses to appear, the Court may nominate the Official Solicitor as the infant defendant's guardian *ad litem* (*k*). But where the infant is abroad, and has no substantial interest in the suit, the Court may dispense with the notice (*l*).

Appointment of New Guardian ad litem.—On the death of a guardian *ad litem* a new one will be appointed (*m*). The guardian will be removed if he does not do his duty, or for other sufficient grounds (*n*), or if he have been improperly appointed (*o*). The Probate Court has like power to inquire whether a guardian *ad litem* is a fit and proper person, and to discharge the order of his appointment if he be found an unfit person, and whether the action should or should not be continued (*p*).

Admissions in Pleadings.—Allegations of fact in pleadings which are not specifically or impliedly denied do not bind infants as they do adults (*q*); consequently judgment cannot be obtained against them on admissions or on the pleadings (*r*). Where it is unnecessary a defence on behalf of an infant should not be filed (*s*). But as a judgment cannot be obtained on express admissions by an infant a plaintiff must, as a rule, prove his case; though where the action involves inquiries by the Court, the latter will not insist upon such proof, as in conducting the inquiries it can protect the infant (*t*). But where the plaintiff moved for judgment in a case where the guardian *ad litem* put in no defence, and did not disapprove of the minutes of judgment, the plaintiff was allowed to prove his

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(*i*) *O'Brien* v. *Maitland*, 10 W. R. 275.
(*k*) *White* v. *Duvernay*, [1891] 1 P. 290; 60 L. J. P. 89; Ord. XIII. r. 1.
(*l*) *Lambert* v. *Turner*, 10 W. R. 335.
(*m*) *Needham* v. *Smith*, 6 Beav. 130.
(*n*) *Russell* v. *Sharpe*, 1 J. & W. 482. This application must be made by the infant by his next friend for the purpose of the application, *Cox* v. *Wright*, 11 W. R. 870; Dan. Ch. Pr. 175.
(*o*) *Sandys* v. *Cooper*, 4 L. J. Ch. 162.
(*p*) *Percival* v. *Cross and Others*, 7 P. D. 234; 52 L. J. P. D. & A. 16.
(*q*) Ord. XIX. r. 13.
(*r*) See R. S. C. Ord. XXXII. r. 6; *Byrne* v. *Byrne*, 5 L. R. Ir. 493.
(*s*) *Re Fitzwater*, *Fitzwater* v. *Waterhouse*, 52 L. J. Ch. 83.
(*t*) *Ripley* v. *Sawyer*, 31 Ch. D. 494; 55 L. J. Ch. 407. In this case, on a motion for judgment in default of pleading in a partition action where some of the defendants were infants, an affidavit by the plaintiff was dispensed with, as the usual inquiries were deemed sufficient protection to the infants.

claim by affidavits, without having recourse to trial in order to prove his case; but such a course was to the advantage of the infant (*u*).

Discovery.—Discovery can be sought against an infant either by way of interrogatories, or by discovery of documents (*x*). It is a matter of some doubt whether interrogatories can be served on a minor who is a suitor in the Divorce Court, but they cannot be served for the purpose of obtaining an admission of adultery from him or her (*y*). An admission in an action of a person from whom an infant derives title may be used against him (*z*). But an infant heir when plaintiff is not so bound (*a*). A guardian *ad litem* is now such a party to the action as to render him compellable to answer interrogatories (*b*).

Infant Bound by Consent.—The consent of a next friend or guardian *ad litem* as to the mode of conducting a cause shall bind the infant if given with the consent of the Court or a judge (*c*).

New Defence After Majority.—If an infant defendant on coming of age is dissatisfied with the defence put in by his guardian, he may apply, whether before or after judgment, to the Court for leave to amend his defence or put in a new one (*d*); but his application must be made as soon as possible after reaching majority, otherwise his laches will disentitle him to relief (*e*). How far an infant, whether plaintiff or defendant, is bound by a judgment or decree, has been discussed above (*f*).

Addition of Infant Parties.—The practice as to bringing in an infant born after judgment in an action in which he becomes an interested or necessary party on his birth has not been uniform, but the weight of authority is to the effect that a supplemental action is not necessary. The late Sir G. Jessel drew up an order which he directed in such a case should be obtained. The order was to the following effect: that "an

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(*u*) *Re Fitzwater, Fitzwater* v. *Waterhouse* (*ubi sup.*). See *Gardner* v. *Tapling*, 33 W. R. 473.
(*x*) R. S. C. 1893, Ord. xxxi. r. 29.
(*y*) *Redfern* v. *Redfern*, [1891] P. 139; 60 L. J. P. 9.
(*z*) *Holden* v. *Hearn*, 1 Beav. 445; 8 L. J. Ch. 260.
(*a*) *Thorns* v. *Bowyer*, 4 L. J. Ch. 68.
(*b*) R. S. C. 1893, Ord. xxxi. r. 29.
(*c*) Ord. xvi. r. 21. See *Knatchbull* v. *Fowle*, 1 Ch. D. 604.
(*d*) Dan. Ch. Pr. 178, 181.
(*e*) See *Bennet* v. *Leigh*, 1 Dick. 89.
(*f*) *Ante*, chap. ii. p. 771.

inquiry be made whether any proceedings affecting the interest of the infant in this action have been had therein since his birth, and if so, whether it will be fit and proper, and for the benefit of the infant, that he should be bound by the said decree (or judgment, or order) and the proceedings thereunder, and if it shall be so certified, it is ordered that the infant be bound accordingly, as from the date of the said decree, &c.; and in that case, or in case it shall appear that no proceedings affecting the interest of the infant in this action have been had since his birth, it is ordered that the accounts and inquiries directed by the said decree, &c., be carried on and prosecuted by the plaintiff against the infant in like manner as if the infant had been originally a defendant to this action" (*g*). But this order is conditional upon the appearance of the infant by his guardian, and if the latter refuses to appear, the order would be inoperative (*h*). This difficulty has been obviated by prefacing the above order with a direction that the proceedings in the action be carried on between the plaintiffs and defendants and the infant. By means of such additional direction regular appearance can be entered. The first part of the order will make the infant a defendant in the action, and then regular service will be effected, and the result will be that he has been made a party to the action. The practice will therefore be assimilated to a case where the new party added is *sui juris*; and although a party *sui juris* can waive any objection, but an infant cannot, yet the Court can waive the objection on behalf of the infant, if it be satisfied that by so acting it is acting for the benefit of the infant. The practice, therefore, is for the infant first to be made a regular party, and then for the inquiry to proceed. If the inquiry be answered in the affirmative, the infant forthwith becomes bound, but if the inquiry be answered in the negative, it will be open for the plaintiff to proceed by supplemental action (*i*). Notice of an order or judgment must be served on an infant in the same manner as a writ of summons in an action (*k*).

Costs.—The guardian *ad litem* and the infant defendant may be ordered to pay the costs of a successful action against

(*g*) This was followed by Chitty, J., in *Peter* v. *Thomas-Peter*, 26 Ch. D. 181; 53 L. J. Ch. 514. See Set. Judg. & Ord. 102.

(*h*) *Peter* v. *Thomas-Peter* (*ubi sup.*).

(*i*) *Capps* v. *Capps*, L. R. 4 Ch. App. 1; *Peter* v. *Thomas-Peter*, (*ubi sup.*); Set. Judg. & Ord. 106.

(*k*) Ord. XVI. r. 34.

them (*l*). The infant's costs may be charged on his share in a partition action (*m*). Where an infant has become liable for costs, the solicitor should not deliver the bill to the infant himself, but to his parent or guardian (*n*).

Injunction.—A person after attaining majority is liable to have an injunction granted restraining him from committing a breach of an agreement entered into by him during infancy (*o*).

Proof of Infancy in an Action.—When a defendant sets up the plea of infancy in an action the onus of proof lies on him (*p*); and strict evidence of it is required. The best evidence of a person having been born on a particular day is that of some one who was present at his birth, or in the house on that date (*q*), and who can identify him. Hearsay evidence of it is insufficient; thus, a letter of a deceased parent stating the exact age of the infant is inadmissible (*r*); so, too, an affidavit stating the date of the defendant's birth made by his dead father in an action to which the plaintiff was not a party has been held inadmissible as evidence of the defendant's age (*s*). An entry in the register of baptisms of the date of birth is not evidence of the date of birth, but only of the baptism (*t*); and a certified copy of an entry in the register of births under the Registration Act, 1836 (*u*), is evidence of the date of birth (*x*), but is not proof of all the facts stated therein as to the identity of the father, or that the parents named were married (*y*).

(*l*) *Vivian* v. *Kennelly*, 63 L. T. 778. See *Chubb* v. *Griffiths*, 35 Beav. 127, in which case an infant who had acted fraudulently was condemned in costs occasioned by his misconduct.

(*m*) *Frazer* v. *Thompson*, 1 Giff. 337.

(*n*) Rule 7 of the General Order of the Solicitors' Remuneration Act, 1881.

(*o*) See *Evans* v. *Ware*, [1892] 3 Ch. 502.

(*p*) *Jeune* v. *Ward*, 2 Stark. 328; *Hartley* v. *Wharton*, 4 Jur. 576.

(*q*) *Burghart* v. *Angerstein*, 6 C. & P. 690, 696.

(*r*) See *Figg* v. *Wedderburne*, 11 L. J. Q. B. 45.

(*s*) *Haines* v. *Guthrie*, 13 Q. B. D. 818; 53 L. J. Q. B. 521.

(*t*) *Burghart* v. *Angerstein*, 6 C. & P. 690; *Re Turner*, *Glenister* v. *Harding*, 29 Ch. D. 985.

(*u*) 6 & 7 Wm. IV. c. 86, s. 38.

(*x*) *In the Estate of Goodrich*, *Payne* v. *Bennett*, [1904] P. 138; 73 L. J. P. 33; *Brierley* v. *Brierley and Williams*, [1918] P. 257; 87 L. J. P. 153; dissenting from *Re Wintle*, L. R. 9 Eq. 373.

(*y*) *Re Stollery* (*deceased*), *Weir* v. *Treasury Solicitor*, December 9, 1925, unreported.

PART V.

MASTER AND SERVANT.

CHAPTER I.

DOMESTIC AND MENIAL SERVANTS.

Blackstone in his Commentaries (*a*) says that the relation of Master and Servant "is founded in convenience, whereby a man is directed to call in the assistance of others where his own skill and labour will not be sufficient to answer the cares incumbent upon him."

Definition.—Without venturing to attempt to define exhaustively (which would be next to an impossibility), the following is put forward as a rough definition of the terms "servant" and "master." A "servant" is a person who voluntarily agrees, whether for wages or not, to subject himself at all times during the period of service to the lawful orders and directions of another in respect of certain work to be done. A "master" is the person who is legally entitled to give such orders and have them obeyed (*b*). This definition does not embrace a large number of persons who from time to time, and for various purposes, are styled servants; thus, "in actions for seduction, a person who does any trifling act of service is regarded as a servant. Mere casual temporary employment for a particular purpose will not suffice to make a person a servant within the meaning of some statutes. In the case of others this is enough. Servant is used, for example, in one

(*a*) 1 Com. 422.

(*b*) See *Townshend* v. *Windham*, 2 Vern. 546. Mr. Justice Stephen in his "Digest of the Criminal Law" (p. 220) thus defines a servant: "A servant is a person bound either by an express contract of service or by conduct implying such a contract, to obey the orders and submit to the control of his master in the transaction of the business which it is his duty as such servant to transact." See *Reg.* v. *Negus*, L. R. 2 C. C. R. 34; 42 L. J. M. C. 62.

sense in the Carriers Act (11 Geo. IV. & 1 Wm. IV. c. 68, s. 8), and in another in the Larceny Act (24 & 25 Vict. c. 96, s. 68)" (*c*).

Hale in his Analysis (*d*) classifies the relationship now under discussion among the "relationships œconomical," or domestic relations; and Blackstone also styles it an "œconomical relation." It is a thoroughly domestic relationship.

Domestic Servants.—There is no hard-and-fast rule as to who are domestic or menial (*e*) servants; and each case must depend upon its own particular circumstances. The word "menial" is of wider import than the word "domestic," and includes it (*f*). Every servant who at all times during the period of his service is under the immediate control, discipline, and management of his master, and is also liable to attend his person, falls within the category of menial; whereas domestic servants are those who form part only of the family household of their employer, but in relation to the legal incidence of their contracts of service domestic and menial servants are treated as indistinguishable.

Menial servants, as including domestic, will form the subject-matter of the succeeding pages. All indoor servants

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(*c*) Macd. M. & S. 37.

(*d*) P. 33.

(*e*) The term "menial" is derived through the French "*meisnee*," "*menie*," from the low Latin word "*mansionata*," signifying a household. Its meaning was afterwards extended, and it signified under the form "meiny," a following, or retinue. Shakespeare thus uses it: "They summoned up their meiny; straight took horse; commanded me to follow, and attend" (*King Lear*, Act ii. sc. 4). It is also found in Chaucer:

> "And in her hows she abode with such meyne
> As to her honour nede was to holde."
>
> *Troylus and Crysede*, Book I. 127.

The word "meniality," signifying "common people," is formed from it. Blackstone derives the word from "*mœnia*," signifying that such servants dwelt within the walls of the domestic establishment of their master, as distinguished from those who lived out of doors and away from the house, but this derivation has no philological basis. The suggested derivation of Mr. Manley Smith from the Greek μήν (a month) is more quaint than accurate; for the term "menial" was in vogue long before it became the custom to pay domestic servants by the month, which is the growth of quite modern days. Their hiring is still legally by the year. It is not likely that a Greek word would be employed to express such a homely every-day relation as that of master and hired servant. The term "menial" bears at the present time a narrow signification indicative almost of degradation; but that does not prevent its being a convenient word to designate those servants who are in the exclusive service of their master.

(*f*) Schouler, Dom. Rel. s. 454, following the inaccurate definition given by Blackstone, would make *menial* of narrower import than *domestic;* but it is submitted that the latter is included in the former, for by domestic servants it is difficult to designate those not engaged in the domestic establishment; again, the common expression "menial acts" can be applied to services rendered equally by outdoor as well as indoor servants.

whose duty it is to attend the master, and perform household acts, and who are under the immediate and exclusive control of the master, are clearly menial and domestic servants; but others whose work and duties could not be so described have been held to be menial servants; thus, a head-gardener, at £100 a year, residing in a detached house belonging to his master, with the privilege of taking apprentices (of which he had availed himself), and having five under-gardeners under him, has been held a menial servant (*g*). So, a huntsman, engaged on the following terms: "£100 a year; draft hounds; house; coals, and bones; leave to keep a pig; two coats; two waistcoats; two pairs of breeches; two pairs of boots; one cap; one whip; and one pair of spurs," was held to be a servant (*h*); so also, one who entered into service under a written agreement that he was to have six shillings a week, three bolls of wheat, to set potatoes for his family's use, to have a cow kept, house and firing, and to keep a pig, no poultry to be kept, his wife to keep the museum clean, he himself to keep the gardens and pleasure-grounds in clean and good order, to assist in the stables, and, when required, at hay and corn harvest, to make himself generally useful (*i*); and one who was employed as a potman in a public-house (*k*). On the contrary, a farm bailiff has been held not to be a menial servant (*l*); also a governess (*m*), from the position she holds in the family of her employer and society generally; and a tutor, on like reasoning, would be held not to be a domestic or menial servant. It has also been held that the housekeeper of a large hotel is not a menial servant, and cannot be dismissed on a month's notice in the absence of an express agreement (*n*); also that a steward is not a menial servant (*o*). In deciding whether or not a particular person belongs to the class of menial servants the duties have to be taken into account, and housekeepers in private houses may or may not be included. If not included in the class a housekeeper may be entitled, on dismissal without notice, to damages in respect of the value of her board and lodging in the master's establishment in addition to loss

(*g*) *Nowlan* v. *Ablett*, 2 C. M. & R. 54.
(*h*) *Nicoll* v. *Graves*, 33 L. J. C. P. 259.
(*i*) *Johnson* v. *Blenkensopp*, 5 Jur. 870.
(*k*) *Pearce* v. *Lansdowne*, 62 L. J. Q. B. 441.
(*l*) *Louth* v. *Drummond*, cited Smith, M. & S. 95.
(*m*) *Todd* v. *Kerrick*, 22 L. J. Ex. 1.
(*n*) *Lawler* v. *Linden*, 10 Ir. C. L. Rep. 188.
(*o*) See *Forgan* v. *Burke*, 12 Ir. C. L. Rep. 495.

of money wages during the term of a reasonable notice, which will probably be held to be one month (*oo*).

Legacies to Servants.—The question as to who are or are not domestic or menial servants has frequently been discussed in cases dealing with legacies to "servants"; and it is possible to gather from these cases certain principles which may serve as guides. The servant to whom, as such, a legacy is left must have given up his time exclusively to the service of the testator (*p*), and must not be subject to the orders of any other person than the testator (*q*); so, a coachman supplied by a job-master, who paid him weekly wages, not living in the testator's house, but paid by him a weekly sum as board wages, and returned as his coachman, was held *not* to be a servant of the testator (*r*); but where a coachman had been hired by and lived many years with a testatrix, though his wages were paid by a job-master, he was held to be a servant of the testatrix (*s*); and servants employed by the committee of a lunatic do not take under a bequest to the lunatic's servants (*t*). The above are instances of those who are not domestic servants; but if the legacy is bequeathed to "domestic servants" or "servants in my domestic establishment," or "household servants," a distinction must be drawn between indoor and outdoor servants to the exclusion of the latter (*u*). A bequest to "servants indoor and outdoor, including estate clerks or staff on my estates," does not include resident land agents (*x*). A bequest to "indoor and outdoor servants" has been held to include under-gardeners, estate carpenters, estate labourers, a lodge-keeper, and an errand or odd job man (*y*), and in another case to include an estate cashier, a farm bailiff, a dairymaid, an engineer, a blacksmith, gardeners, carters, carpenters, game-keepers, woodmen, bricklayers, farm hands and labourers who were paid weekly, monthly, or quarterly wages (*z*). Another test is the period for which the servant has been hired; if the hiring has been a yearly one, and a legacy of a year's wages

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(*oo*) *Blandford* v. *Fenez*, June, 1924, unreported.
(*p*) *Townshend* v. *Windham*, 2 Vern. 546. (*q*) Smith, M. & S. 565.
(*r*) *Chilcot* v. *Bromley*, 12 Ves. 114.
(*s*) *Howard* v. *Wilson*, 4 Hag. Eccl. Rep. 107.
(*t*) *Re King, Jackson* v. *Att.-Gen.*, [1917] 2 Ch. 420; 87 L. J. Ch. 3.
(*u*) *Ogle* v. *Morgan*, 1 De G. M. & G. 359; *Re Drax, Savile* v. *Yeatman*, 57 L. T. 475; *Re Ogilby, Cochrane* v. *Ogilby*, [1903] 1 Ir. Rep. 525.
(*x*) *Re Earl Brownlow, Tower* v. *Sedgwick, Re Cassel, Public Trustee* v. *Ashley*, 39 T. L. R. 75.
(*y*) *Re Earl of Sheffield, Ryde* v. *Bristow*, [1911] 2 Ch. 267; 80 L. J. Ch. 521.
(*z*) *Re Drake, Drake* v. *Green*, [1921] 2 Ch. 99; 90 L. J. Ch. 381.

is left to the servant, he would be entitled to it; and it is only servants that are usually hired by the year that are entitled to such legacies (*a*). If the servant has been hired at weekly wages he is not entitled to the legacy (*b*). But in the case of *Thrupp* v. *Collett* (*c*), the direct contrary was held, seemingly on the ground that it was a very unusual thing to pay the wages of the servants in question (head- and under-gardeners) by the week, and in a later case the Court distinguished the decision in *Re Ravensworth, Ravensworth* v. *Tindale*, and declared that all the indoor and outdoor servants were entitled, whether they were paid weekly or yearly wages, on the ground that the gift made by the testator was of "the amount of one year's wages" (*d*). A bequest of a year's wages to each of the servants of the testator living with him at his decease, who should then have lived three years in his service, does not exclude servants of the testator living in a different house from that in which the testator lived (*e*).

Whether the servants must be in the testator's service at the date of his death (*f*), or it is sufficient that they were in his service at the date of the will (*g*), depends upon the wording of the bequest; thus, if a testator bequeaths an annuity to his servant, providing he is in his service at the time of his decease, and the servant is wrongfully discharged (*h*), or voluntarily leaves the service of the testator (*i*), he loses the benefit of the legacy. Where the amount of the legacy was dependent on the length of the service it was held that the period of military service could not be deemed the service of the testator, but that periods before and after the war could be added together (*k*). Where a sum equivalent to salaries for a certain period are given, commission payable in addition to wages is not to be taken into account (*l*).

(*a*) *Booth* v. *Dean*, 1 Myl. & K. 560. See *post*, chap. iii. p. 884.
(*b*) *Blackwell* v. *Pennant*, 16 Jur. 420; *Re Ravensworth, Ravensworth* v. *Tindale*, [1905] 2 Ch. 1; 74 L. J. Ch. 353.
(*c*) 26 Beav. 147.
(*d*) *Re Earl of Sheffield, Ryde* v. *Bristow* (*ubi sup.*).
(*e*) *Blackwell* v. *Pennant* (*ubi sup.*).
(*f*) *Jones* v. *Henley*, 2 Ch. Rep. 361.
(*g*) *Parker* v. *Marchant*, 6 Jur. 292; on appeal, 7 Jur. 547.
(*h*) *Darlow* v. *Edwards*, 32 L. J. Ex. 51.
(*i*) *Re Serres' Estate, Venus* v. *Marriott*, 31 L. J. Ch. 519.
(*k*) *Re Drake, Drake* v. *Green* (*ubi sup.*).
(*l*) *Re Smith, Phillips* v. *Smith*, [1915] W. N. 12; *Re Whelan, Doyle* v. *Woodliff*, 153 L. T. J. 47.

CHAPTER II.

PARTIES TO THE CONTRACT OF HIRING AND SERVICE.

As a general rule, every person of the full age of twenty-one years, and not under any legal disability, is capable of becoming either a master or servant. But in order that a contract of hiring and service may be legally binding, it is necessary that, at the time such a contract is entered into, the party about to be hired should be free from any other engagement incompatible with that into which he is about to enter; in other words, he must be *sui juris* (*a*). The demands, however, of social life have necessitated a relaxation of the above rule, and it will be seen upon inquiry that valid contracts may be made by those who are not *sui juris*, both as to hirers and the hired. Thus, married women, infants, and lunatics may be parties to this contract.

Hiring by Married Woman.—A contract for the hire of a servant by a married woman, as mistress of a household, is a good and binding one, and her husband will in most cases be bound by it to pay the servant's wages; for the authority of the wife during cohabitation is that of her husband's agent (*b*). The authority and agency of the wife are easily to be gathered from her position in the domestic establishment. This authority need not be given by writing (*c*). It may be given expressly, or may be implied from circumstances. A servant suitable to their degree in life, engaged and hired by the wife, can recover wages from the husband (*d*). Where the husband and wife do not cohabit, the liability or non-liability of the husband depends upon the circumstances of the case, such as whether the wife had or had not a sufficient separate maintenance from any source (*e*). If the wife has been expressly

(*a*) Smith, M. & S. 1.
(*b*) See Part I., Husband and Wife, chap. xii. pp. 288 *et seq.*
(*c*) *White* v. *Cuyler*, 1 Esp. 200.
(*d*) *Jewsbury* v. *Newbold*, 26 L. J. Ex. 247.
(*e*) *Clifford* v. *Laton*, M. & M. 101; *Reeve* v. *Marquis Conyngham*, 2 C. & K. 444.

forbidden to hire a servant, and the servant is aware of it, the husband is not liable for the wages (*f*). Where the wife has separate property, or her act of hiring has taken place apart from her husband, and has been disowned by him, the Court would enforce the contract against her (*g*), and under the present state of the law her liability in this respect is greater than it was formerly.

Married Women as Hired Servants.—A married woman when living with her husband was at common law, as has been already seen (*h*), incapable of entering into a valid contract, and this incapacity included contracts of service; thus, under the Master and Servant Act, 1867 (*i*), a married woman was held incapable of entering into a valid contract of service under that Act independently of her husband (*k*). A wife could effect a valid contract of service where her husband was *civiliter mortuus*, or she had been judicially separated (*l*), or had obtained an order protecting her earnings from the claims of her husband (*m*). Under the Married Women's Property Act, 1870 (*n*), the wages earned by her separately from her husband, and the invested savings the result of such wages, were hers absolutely, and she possessed the like remedies, civil and criminal, for the protection and security of her wages and earnings as though she were unmarried.

The question now arises whether a married woman has under recent legislation the capacity to enter into a valid contract of service independently of her husband with whom she is cohabiting. The Married Women's Property Act, 1870, has been held not to have conferred upon her any further contractual power than she at that time possessed in equity (*o*). Though the Married Women's Property Act, 1882 (*p*), is much wider in its effects than the earlier Act of 1870, which it repeals, and does confer upon the married woman enlarged contractual powers, yet, it is submitted, these are confined to matters

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(*f*) *Etherington* v. *Parrott*, 1 Salk. 118.
(*g*) See *Hope* v. *Carnegie*, L. R. 7 Eq. 254.
(*h*) See Part I., Husband and Wife, chap. xii. pp. 262 *et seq.*
(*i*) 30 & 31 Vict. c. 141.
(*k*) *Tomkinson* v. *West*, 32 L. T. 462.
(*l*) 20 & 21 Vict. c. 85, s. 25; and 58 & 59 Vict. c. 39, s. 4, repealing 41 Vict. c. 19, s. 4.
(*m*) 20 & 21 Vict. c. 85, s. 21. See Part I., Husband and Wife, chap. xii. s. 4.
(*n*) 33 & 34 Vict. c. 93, ss. 1, 11.
(*o*) *Howard* v. *The Bank of England*, L. R. 19 Eq. 295; 44 L. J. Ch. 329.
(*p*) 45 & 46 Vict. c. 75.

involving her proprietorial relations to her separate estate, and does not confer upon her the power of entering into a binding contract of service without the assent of her husband; and for this reason, that she might put an end to the matrimonial cohabitation without his consent and for no fault of his—a power which it never could have been intended by the Legislature to confer upon her. If, then, the wife leaves the husband and goes into service against his wish, and the latter gives the employer notice of his dissent, who notwithstanding keeps her in his service, the husband will be able to maintain an action for harbouring his wife and depriving him of the comfort of her society. Of course, with his consent a wife may hire out her services and labour as she pleases, and whatever she receives in return by way of remuneration is and remains her separate property. No doubt the husband's assent is very readily inferred; in fact, non-dissent on his part, where he could express it, would be sufficient. Where he has deserted her, or she has been judicially separated from him, his assent is not required, for she is in most respects a single woman. If during his absence she entered into a contract of service, it would be valid until he elected to put an end to it on his return; and all wages earned by her in respect of it would remain her separate property. Since the altered state of the law, payment to a married woman of her wages or earnings is good, and her receipt for them is a good discharge to the hirer; where as under the old law, when her earnings became her husband's property, payment to her did not discharge the hirer (*q*). Such payment to the wife would be good, even if the husband dissented from her contract of service; for, as he now has no interest of any sort (*inter vivos*) in her property, including wages and earnings, consequently, though he might refuse to ratify the contract, he could not make any valid demand under it; and if he sued the employer for her wages, it would be a good defence to allege that he took no interest under the contract, and that by force of the statute the wife alone could give a valid receipt for them.

Marriage does not put an end to the woman's contract of service (*r*); but, as before stated, it must be allowed that the husband should have power and authority to decide whether she should continue in service, or in what particular kind of service,

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(*q*) *Offley* v. *Clay*, 2 M. & G. 172.
(*r*) *Rex* v. *Tardebigg*, Burr. Sett. Cas. 322.

and to assert his right of matrimonial cohabitation, if she leaves him for the purpose of earning an independent living.

Infants.—An infant in many cases, it has been seen, cannot make contracts binding on himself; but where such contracts are made by him to supply himself with what are found to be necessaries, then they are binding on him. Therefore, by analogy, a contract by an infant for the hire of a servant or servants suitable to his degree in life would be binding on him, and such servant could recover the stipulated wages (*s*).

Lunatics.—"Strictly speaking, a person of unsound mind is incompetent to contract, yet there can be no doubt that a lunatic would be held liable to pay for any services which had been rendered to him, provided they were such as might reasonably be considered necessary for a person in his station in life. In such a case the law could imply a promise to pay for them; and modern cases show that where a party entering into a contract is a lunatic, but the state of his mind is unknown to the other party, who has taken no advantage of the lunatic, he would not be allowed to set up his lunacy as a defence to the action on the contract, especially in a case where the contract was not merely executory, but executed in whole or in part, and the parties could not be restored altogether to their original position" (*t*). "The obligation is not properly a contractual obligation; it is an obligation imposed by law from the fact that necessaries have been supplied to a person who is unable to contract, but it is none the less an obligation, and it has exactly the same status as a debt; it is recoverable under the same circumstances that a debt would be, and the power of recovering it is limited precisely in the same way by the same Statute of Limitations" (*u*). Where the Crown was claiming for the cost of maintenance of a criminal lunatic it was held that there was a statutory liability for the full expenditure, and that there was no limitation against the Crown (*x*). In the case of an executory contract the knowledge of the lunacy of the defendant must be brought home to the plaintiff (*y*). The services of a servant to attend to his wants would be deemed a necessary in most cases, and it is only fair that these should be paid for if supplied to him in good faith (*z*).

(*s*) See *Chapple* v. *Cooper*, 13 M. & W. 252; 13 L. J. Ex. 286.
(*t*) Sm. M. & S. 15; *Molton* v. *Camroux*, 18 L. J. Ex. 356.
(*u*) *Re J.*, [1909] 1 Ch. 577; 78 L. J. Ch. 348, per Fletcher Moulton, L.J.
(*x*) *Ibid.* (*y*) *Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 599.
(*z*) *Baxter* v. *Earl of Portsmouth*, 5 B. & C. 170.

CHAPTER III.

THE CONTRACT OF HIRING AND SERVICE.

The Consideration.—In a contract of hiring and service, as in other contracts, there must be consideration on which to found the agreement between master and servant, and it must be express, or necessarily implied. Whether there is consideration or not is sometimes a matter of great doubt and nicety, and would, of course, in most instances, depend upon the terms used by the parties; but the authorities do not supply any clear rule in cases where the consideration is not expressed in so many words (*a*). The Courts, however, will not inquire into the adequacy of the consideration, for otherwise they would be taking upon themselves to decide whether the parties had made a proper bargain for themselves (*b*). But where the consideration is altogether illegal or immoral, the Courts would decline to enforce the contract based upon it (*c*).

Duration of the Contract.—In the absence of any express or implied stipulation as to its duration, the contract of hiring between a master and a servant is deemed to be a general one, and to last for the period of a year (*d*); and this rule of law is applicable to the hiring of domestic servants (*e*). Where a domestic servant is hired, and there is no mention made of the duration of the hiring, or of the time for giving notice or warning, it is now a well-established and judicially recognized custom that the hiring is for the space of a year, but may be determined at any moment by either party giving the other a a month's notice or warning, or a month's wages in lieu of such notice (*f*). If, however, the servant is dismissed during

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(*a*) See Macd. M. & S. 139 *et seq.*

(*b*) *Hitchcock* v. *Coker*, 6 A. & E. 438.

(*c*) See *Cope* v. *Rowlands*, 2 M. & W. 149; *Rex* v. *Northwingfield*, 1 B. & Ad. 912.

(*d*) *Fawcett* v. *Cash*, 5 B. & Ad. 904; *Buckingham* v. *The Surrey and Hants Canal Co.*, 46 L. T. 885.

(*e*) See *Rex* v. *Worfield*, 5 T. R. 506.

(*f*) *Fawcett* v. *Cash* (*ubi sup.*) : "In the case of domestic servants, the rule is well established that the contract may be determined by a month's notice

the currency of a month's notice given by her to terminate the service, the damage recoverable on wrongful dismissal is not one month's wages without board, but is the actual pecuniary loss sustained, including board and lodging between the date of the wrongful dismissal and the date of the expiration of the notice (*g*).

Where the term of service is express, or the contract contains stipulations, conditions, or other matters which clearly show that the parties to it meant some period other than a year, the legal presumption is rebutted. It is where the contract is for an indefinite time that the period of a year is implied (*h*); and such presumption is excluded where the terms of the contract are inconsistent with it, as where either party shall be at liberty to determine the contract at any time (*i*); or if the hiring be for less than a year (*k*), as, for instance, when a servant is taken "on trial" for a month; or where the master has not the exclusive control over the servant (*l*). Again, where well-established custom permits the hiring to be terminated after a certain notice, the giving of such customary notice, though but a short time after the commencement of the contract, puts an end to it.

Test of Duration.—Where there is nothing in the contract to show that it is not intended to be a yearly hiring, but rather the opposite conclusion may be inferred, the paying of wages at short intervals, such as a fortnight, will not render it less a contract to endure for a year (*m*), and even the payment of wages by the week, where the contract contained a stipulation

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or a month's wages." Per Littledale, J., in *Turner* v. *Mason*, 14 L. J. Ex. 311. See *Moult* v. *Halliday*, [1898] 1 Q. B. 125; 67 L. J. Q. B. 451. In this case an additional custom of giving the right to either party to determine the service at the end of the first calendar month by notice given at or before the expiration of the first fortnight was sought to be upheld; and though it was decided that the custom was not notorious enough to be taken judicial notice of, yet it was not an unreasonable one, if it could be established by evidence. With all due deference this statement, which was really *obiter*, seems hardly to be correct, for the proposed custom is quite inconsistent with and destructive of the existing one; and two such customs cannot exist side by side with equal legal results. Customs must be consistent with each other, one custom cannot be set up in opposition to another; for if both are really customs, then they are of equal antiquity, and must have been established by mutual consent, which to say of contradictory customs is absurd (per Bayley, J., in *Rogers* v. *Brenton*, 10 Q. B. 26; 17 L. J. Q. B. 34).

(*g*) *Lindsay* v. *Queen's Hotel Co., Lim.*, [1919] 1 K. B. 212; 88 L. J. K. B. 535.

(*h*) *Rex* v. *Newton*, 10 B. & C. 838; see also *Baxter* v. *Nurse*, 1 C. & K. 10.

(*i*) *Rex* v. *Great Bowden*, 7 B. & C. 249.

(*k*) *Rex* v. *Standon Massey*, 10 East, 756.

(*l*) *Rex* v. *Killingholme*, 10 B. & C. 802.

(*m*) *Rex* v. *Birdbrook*, 4 T. R. 425.

that a month's notice should be given to determine the hiring, was held not to take it out of the category of general hiring (*n*). But in the cases where the only means of ascertaining the duration of the contract is the reservation of weekly wages, then the period of service is deemed to be but weekly (*o*); thus, a weekly hiring at so much a week for a year is a weekly and not yearly hiring (*p*). There is no contract of service at all when the circumstances tend to rebut such a presumption, as where a person is taken and housed *out of charity* (*q*), or where the agreement was for cohabitation and not really for service (*r*).

Customary Notice.—The contract of service of domestic or menial servants by custom may be determined on either side *at any time* by giving a month's (*s*) notice or warning, or by paying a month's wages in lieu of notice (*t*). The servant discharged is entitled to a proportionate amount of wages for the time served at the moment of leaving service (*u*).

Servant Leaving without Notice.—But where a domestic servant wrongfully quits his employment he forfeits all claim to wages for that portion of time during which he has served, and cannot, after having wilfully violated the contract according to which he was hired, claim the sum to which his wages would have amounted if he had not broken his contract, merely deducting therefrom one month's wages (*x*). Thus, if a servant were paid quarterly according to the terms of his hire, and wrongfully left in the middle or towards the end of a quarter, he would forfeit all the wages of the current quarter (*y*). The effect of this is to compel the servant to give his master proper and timely notice if he wishes to save his wages. This is equally the case where the servant is rightfully discharged by his master at a moment's notice and without payment in lieu of notice. Wages due but unpaid at the last period fixed for their payment would, however, be recoverable by the servant though he subsequently

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(*n*) *Rex* v. *Great Yarmouth*, 5 M. & S. 114.
(*o*) *Rex* v. *St. Andrews*, 8 B. & C. 679; *Towne* v. *Campbell*, 3 C. B. 921.
(*p*) *Robertson* v. *Jenner*, 15 L. T. 514.
(*q*) *Rex* v. *Sow*, 1 B. & Ald. 178.
(*r*) *Rex* v. *Northwingfield*, 1 B. & Ad. 912.
(*s*) Calendar month. *Simpson* v. *Margetson*, 11 Q. B. 27.
(*t*) *Fawcett* v. *Cash*, 5 B. & Ad. 904; *Beeston* v. *Collyer*, 4 Bing. 309, 313. See *Moult* v. *Halliday*, [1898] 1 Q. B. 125; 67 L. J. Q. B. 451.
(*u*) See *Gordon* v. *Potter*, 1 F. & F. 644.
(*x*) *Spain* v. *Arnott*, 2 Stark, 256. See *Walsh* v. *Walley*, L. R. 9 Q. B. 367; 43 L. J. Q. B. 102.
(*y*) *Walsh* v. *Walley*, (*ubi sup.*); *Boston Deep Sea Fishing and Ice Co.* v. *Ansell*, 39 Ch. D. 329, 359.

left his master's service without giving proper notice, or was rightfully discharged without notice (*z*).

Statute of Frauds.—A contract for the hire of a servant may be either by deed or by parol. If the contract (whether made in England or out of England (*a*)) is one that on its face cannot be performed within a year from the date of its inception, then the fourth section of the Statute of Frauds (*b*) is applicable, and its terms must be reduced into writing, though not necessarily in the shape of a formal agreement, and a proper compliance must be made with the provisions of that section if an action is to be founded on it (*c*). An oral agreement made on May 27, that a servant should enter service for a year to commence from June 30 following (*d*), and a like agreement (though there was a memorandum, but unsigned) made on July 20, to take effect from July 24, were both held to be within the statute (*e*). An agreement for a year's service made on a Saturday was presumed by the Court to come into operation on the Monday following, and, therefore, was held to be unenforceable (*f*). Though such contract may be defeasible within the year, it is none the less within the statute (*g*). But the statute does not affect contracts which have been completely executed on one side (*h*), or apply to a hiring which is merely implied from circumstances (*i*); nor does it extend to cases where the contract need not necessarily extend beyond a year, although as a matter of fact it has not been performed, if it is such that it might be performed within the year, and there is no stipulation to the contrary (*k*). The equitable doctrine of part performance is not extended to a contract of service by section 25, sub-section 7, of the Judicature Act, 1873 (*l*), and under an oral contract of service for more than a year no action lies for wrongful dismissal, the contract in existence being one upon which no action could be brought,

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(*z*) See *Taylor* v. *Laird*, 25 L. J. Ex. 329; *Button* v. *Thompson*, 38 L. J. C. P. 225; *Healey* v. *Société Anonyme Française Rubastic*, [1917] 1 K. B. 946.
(*a*) *Leroux* v. *Brown*, 22 L. J. C. P. 1.
(*b*) 29 Car. II. c. 3.
(*c*) *Leroux* v. *Brown* (*ubi sup.*).
(*d*) *Bracegirdle* v. *Heald*, 1 B. & Ald. 722.
(*e*) *Snelling* v. *Lord Huntingfield*, 1 C. M. & R. 20; *Banks* v. *Crossland*, L. R. 10 Q. B. 97; 44 L. J. M. C. 8; *Davey* v. *Shannon*, 4 Ex. D. 81; 48 L. J. Ex. 459.
(*f*) *Cayme* v. *Allan, Jones & Co.*, 35 T. L. R. 453.
(*g*) *Dobson* v. *Collins*, 25 L. J. Ex. 267; *Hanau* v. *Ehrlich*, [1912] A. C. 39.
(*h*) *Cherry* v. *Heming*, 19 L. J. Ex. 63.
(*i*) *Beeston* v. *Collyer*, 4 Bing. 309.
(*k*) *Souch* v. *Strawbridge*, 2 C. B. 808.
(*l*) *Britain* v. *Rossiter*, 11 Q. B. D. 123; 48 L. J. Q. B. 362.

the Court refusing to infer the existence of some other contract for less than a year (*m*). The plaintiff servant suing for wages cannot bring his action under a contract which fails to comply with the statute, but must rely on the principle of an executed consideration for a *quantum meruit* for the services he has rendered to his employer, and for which he has not been paid (*n*).

Stamp.—An agreement for the hire of a menial servant is exempted from the necessity of being stamped by virtue of the Stamp Act, 1891 (*o*).

Domicile.—Domestic service does not *per se* confer upon the servant the domicil of his master (*p*).

(*m*) *Ibid.*
(*n*) *Scott* v. *Pattison*, [1923] 2 K. B. 723; 92 L. J. Q. B. 886.
(*o*) 54 & 55 Vict. c. 39. Schedule, Agreement (2).
(*p*) See *Jopp* v. *Wood*, 34 L. J. Ch. 211.

CHAPTER IV.

DETERMINATION OF THE CONTRACT OF HIRING AND SERVICE.

The contract of hiring and service may be put an end to or determined in various ways.

Death of Master.—The death of the master puts an end to the contract; and in respect of service after death, the contract is dissolved, unless there be a stipulation express or implied to the contrary (*a*); so, where a farm bailiff was engaged at weekly wages, and his contract of service was to be determined by six months' notice or payment of six months' wages, and the master died, his administratrix was held not bound to continue the bailiff in her employment or pay him six months' wages after his master's death (*b*). The rule that a contract of service, unless otherwise stipulated for, is determined by the death of the hirer, and that, if for a time certain, and the death occur before the expiration of that time, the servant cannot recover wages for any portion of the time that he has served, does not apply to the case of domestic servants, who are by custom paid for the actual services rendered by them; therefore, if a domestic servant be discharged on the death of the master, he can make good a claim for wages earned by him during his period of service (*c*). Servants must look for their wages, if so discharged, to the personal representatives of their masters, that is, their executors or administrators.

A question of some doubt arises where a domestic servant is the servant of two or more partners. Of course where a hirer goes into partnership, the ordinary domestic servants employed in his household are not affected by his partnership. But if the servant is the hired servant of the partnership, which is dissolved either by death or mutual agreement, is the hiring at an end, or

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(*a*) *Farrow* v. *Wilson*, L. R. 4 C. P. 744; 38 L. J. C. P. 326.

(*b*) *Ibid.*

(*c*) See *Cutter* v. *Powell*, 6 T. R. 320. In the course of this case Lawrence, J., said: "With regard to the common case of a hired servant . . . such a servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject that the servant shall be entitled to his wages for the time he serves, though he do not continue in the service during the whole year."

does the servant remain in the employ of the continuing partner? Where in such a case one of the partners dies, unless there is a special provision to the contrary, the partnership is at an end, and so, on principle, the service of the servant would be determined, notwithstanding there was no real change in the duties of the servant (*d*). A dissolution of partnership by mutual agreement would amount to a dismissal, and being wrongful would entitle the servant to damages, though only nominal, if the remaining partners were willing to employ him (*e*). So, too, the appointment of a receiver of the partnership assets would amount to a dismissal of the servant (*f*).

Death of Servant.—The death of the servant clearly determines the contract, for the rendering of the personal services of the hired is no longer possible. There is very little to be said on this point except that the personal representatives of the servant are not liable on such a contract, even if it were worth while to sue them; and that where the servant dies during the currency of his service, custom entitles his representatives to sue for the wages due for the broken period of service (*g*).

Discharge of Servant.—The contract is likewise put an end to by the discharge of the servant.

If a servant be discharged, but refuse to go, the master may use sufficient force to put him from the house (*h*), for the servant's conduct justifies that which would otherwise be an assault.

Grounds of Discharge without Notice.—The next step to be considered is the grounds which will justify the master in discharging a servant without notice; and it may here be mentioned that a ground for such discharge is in most instances a reason for refusing to pay wages. The following are the principal grounds which may be taken to justify the discharge of a servant:—

(a) Wilful disobedience of any lawful order of the master.
(b) Gross moral misconduct.
(c) Habitual negligence in business, or conduct calculated seriously to injure the master's business.
(d) Incompetence, or permanent disability from illness.

(*d*) See *Tasker* v. *Shepherd*, 30 L. J. Ex. 207.
(*e*) See *Brace* v. *Calder and others*, [1895] 2 Q. B. 253; 64 L. J. Q. B. 582.
(*f*) See *Reid* v. *Explosives Co.*, 19 Q. B. D. 264; 56 L. J. Q. B. 388.
(*g*) See *Cutter* v. *Powell (ubi sup.)*.
(*h*) *Mackay* v. *Ford*, 29 L. J. Ex. 404.

Wilful Disobedience.—Wilful disobedience to the lawful orders of the master entitles the latter to discharge the servant without notice (*i*). If a servant wilfully refuses obedience to the lawful order of the master he must suffer for his obstinacy; so, where a female servant persisted in leaving her master's house against his orders, though to go and visit a dying mother, her conduct was held to justify her dismissal (*k*). The master's orders should be confined to those services for which the servant was hired; and the latter cannot be peremptorily dismissed without compensation for refusing to perform services which he never bargained to undertake. Mere obstinate refusal to do a particular act will not justify such a dismissal (*l*). The refusal to do work must be unreasonable in order to form a ground for the servant's discharge, and if the master claims against the servant in respect of a loss sustained by reason of disobedience the loss must be proved (*m*).

Gross Moral Misconduct.—Gross moral misconduct is a good ground for discharging a servant (*n*). Theft from his master (*o*), embezzlement (*p*), pregnancy of a maid-servant (*q*), being the father of a bastard child (*r*), an attempt to ravish a maid-servant (*s*), and drunkenness (*t*), all constitute good grounds for discharge of servant and forfeiture of wages. If a servant is grossly rude and insolent he may be at once dismissed (*u*); so if he is violent and uses abusive language towards his master he may be rightfully given into custody (*x*). It seems, however, that the discovery of the servant's misconduct in a previous situation, unless fraudulently concealed from the second master, is not a ground for instant dismissal, but notice is required (*y*).

Habitual Negligence.—If a servant absent himself from his

(*i*) *Callo* v. *Brouncker*, 4 C. & P. 518.

(*k*) *Turner* v. *Mason*, 14 L. J. Ex. 311. See also *Amor* v. *Fearon*, 9 A. & E. 548; *Spain* v. *Arnott*, 2 Stark. 256.

(*l*) *Jacquot* v. *Boura*, 3 Jur. 776. "It is not every failure in faithful service which will warrant a master in discharging his servant, and if he does, he must discharge him on the occasion of the misconduct, and not at any time after, at the master's option." Per Bramwell, B., in *Horton* v. *M'Murtry*, 5 H. & N. 667, 675; 29 L. J. Ex. 260; and see *Edwards* v. *Levy*, 2 F. & F. 94.

(*m*) *Cussons* v. *Skinner*, 11 M. & W. 161; 12 L. J. Ex. 347.

(*n*) *Callo* v. *Brouncker* (*ubi sup.*).

(*o*) *Cunninghame* v. *Fonblanque*, 6 C. & P. 44, 49.

(*p*) *Spotswoode* v. *Barrow*, 16 L. J. Ex. 226.

(*q*) *Connors* v. *Justice*, 13 Ir. C. L. Rep. 451.

(*r*) *Rex* v. *Welford*, Cald. 57.

(*s*) *Atkin* v. *Acton*, 4 C. & P. 208.

(*t*) *Speck* v. *Phillips*, 5 M. & W. 279.

(*u*) Fras. M. & S. 71; Macd. M. & S. 213.

(*x*) *Shaw* v. *Chairitie*, 3 C. & K. 21.

(*y*) *Andrewes* v. *Garstin*, 31 L. J. C. P. 15.

work, or is habitually negligent in it, he may be summarily dismissed, for otherwise his master might be seriously injured by his misconduct (*z*). So, too, where he acts in a way incompatible with the due and faithful discharge of his duty to his master (*a*). But mere temporary neglect which does not injure the master, does not justify an instant dismissal (*b*). An isolated act of negligence, whether of omission or commission, which caused injury to his master, might be a sufficient ground for his instant dismissal. A servant who is entrusted with the goods of his master is bound to use ordinary diligence in their care and preservation; and if he fail to use it, and loss ensues, he is liable to an action at the suit of his master (*c*). The issues of fact which go to justify dismissal of a servant on the ground of misconduct are for the jury; and while there is no fixed rule of law defining the degree of misconduct which will justify dismissal, it may be laid down with certainty that conduct inconsistent with the fulfilment of the express or implied conditions of service is misconduct justifying dismissal (*d*).

Incompetence, or Permanent Disability from Illness.—If a servant be hired for a particular service or purpose, and he prove utterly incompetent to perform his part of the contract, his employer has clearly a good ground of discharge, for he who cannot is much the same as he who will not perform his duty; *imperitia culpæ adnumeratur* (*e*). In the case of ordinary domestic servants, it would not be safe to dismiss them for incompetence without notice or payment of wages, for it is common knowledge that a great number of servants offer themselves, and are hired to perform services which they are wholly incapable of properly rendering. Want of experience, clumsiness, absence of skill and finish about their work must be expected when untrained servants at low wages are hired, and must be taken as part of the bargain; and it would be safe

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(*z*) *Callo* v. *Brouncker* (*ubi sup.*); *Robinson* v. *Hindman*, 3 Esp. 235; see also *Turner* v. *Robinson*, 5 B. & Ad. 789.

(*a*) *Pearce* v. *Foster*, 17 Q. B. D. 536; 55 L. J. Q. B. 306.

(*b*) *Fillieul* v. *Armstrong*, 7 A. & E. 557.

(*c*) See *Walker* v. *British Guarantee Association*, 18 Q. B. 277.

(*d*) *Clouston and Co.* v. *Corry*, [1906] A. C. 122. In this case it was further laid down that in actions for wrongful dismissal the judge, when he leaves the issues of fact to the jury, should direct, guide, and assist the jury—direct by informing them of the nature of the acts which, as a matter of law, will justify dismissal; guide them by calling their attention to the facts material to the determination of the issues raised; and assisting them as best he may. This case was a decision of the Privy Council on appeal from New Zealand, but is an authoritative exposition of English law and practice on the subject.

(*e*) *Harmer* v. *Cornelius*, 28 L. J. C. P. 85; *Searle* v. *Ridley*, 28 L. T. 411.

to dismiss only in the higher branches of domestic service, where special knowledge and skill were necessary, but which were not forthcoming in the servant who professed to furnish them; as, for instance, a cook who held himself out to be proficient in the art of cooking and demanded high wages for his services, might justifiably be dismissed if he altogether failed to redeem his professions in any essential particular.

A temporary illness with incapacity for work is not a good ground for discharging a servant, unless the contract has been rescinded (*f*). But a permanent sickness would constitute a ground for dismissal (*g*); so would it be where the master was compelled to hire another servant in the place of the sick one (*h*). The wages that had been earned by the servant up to the time of his illness would be payable to him, because the contract had been determined through no fault of his own. Unless the contract is put an end to, there is no suspension of the right of the servant to his wages because of his illness and incapacity to work (*i*).

Knowledge of Grounds for Dismissal.—Knowledge on the part of the master of the actual fact justifying the dismissal is not necessary at the time when he dismisses the servant. If a master discharge a servant, and can subsequently show that at the time of the dismissal a good ground of discharge existed, though he was ignorant of its existence, he can justify his conduct (*k*). The case of *Cussons* v. *Skinner* (*l*) seems to be opposed to the above doctrine; but apparently it was decided on its own peculiar circumstances; and Parke, B., in the later case of *Spotswoode* v. *Barrow* (*m*), though one of the judges who had taken part in its decision, did not feel bound by it. In *Willetts* v. *Green* (*n*), Alderson, B., said: "If an employer discharge his servant, and at the time of the discharge a good cause of discharge in fact exists, the employer is justified in discharging the servant, although at the time of the discharge the employer did not know of the existence of the cause. This point has been much discussed in the House of Lords and elsewhere, but what I have stated is the result."

(*f*) *Cuckson* v. *Stones*, 28 L. J. Q. B. 25.
(*g*) *Ibid.*
(*h*) *Ibid.*
(*i*) *Ibid.*
(*k*) *Willetts* v. *Green*, 3 C. & K. 59; *Spotswoode* v. *Barrow* (*ubi sup.*).
(*l*) *Ubi sup.*
(*m*) *Ubi sup.*
(*n*) 3 C. & K. 59.

Remedy of Servant on Wrongful Dismissal.—If a domestic servant be wrongfully discharged, his remedy is an action against his master for the breach; and the utmost measure of damages would be the amount of a month's wages (*o*), but a jury might give less. If arrears of wages are due to him, or wages have been earned and accrued due since the last day of payment, the servant can recover them on a *quantum meruit* (*p*); but he cannot recover for any further period than that during which he has served (*q*). He may treat the contract as rescinded, and sue for his wages for the period of actual service rendered by him.

Servant not a Tenant.—A servant who is allowed to occupy premises belonging to his master for the convenient performance of his services acquires no estate in them as a tenant (*r*), and must give them up when he ceases to be such servant (*s*), and this is so, even where he is allowed to use the premises for the purpose of carrying on an independent business of his own (*t*). Where, on the other hand, his occupation is allowed as remuneration for his services and is not related to their performance he is a tenant (*u*).

(*o*) *Fewings* v. *Tisdal*, 1 Exch. 295; *Robinson* v. *Hindman*, 3 Esp. 235.

(*p*) *Robins* v. *Power*, 27 L. J. C. P. 257; see also *Smith* v. *Hayward*, 7 A. & E. 544.

(*q*) *Archard* v. *Horner*, 3 C. & P. 349.

(*r*) *Wall* v. *Gibbs*, [1920] W. N. 187.

(*s*) *National Steam Car Co.* v. *Barham*, 122 L. T. 315; *Lever Bros., Lim.* v. *Caton*, [1921] W. N. 190.

(*t*) *White* v. *Bayley*, 10 C. B. (N.S.) 227; 30 L. J. C. P. 253.

(*u*) *Smith* v. *Seghill*, L. R. 10 Q. B. 422; 44 L. J. M. C. 114; *Marsh* v. *Estcourt*, 24 Q. B. D. 147; 59 L. J. Q. B. 100.

CHAPTER V.

THE SERVANT'S CHARACTER.

Privileged Communication.—No master is legally bound to give his domestic or menial servant a character (*a*). If the master does make to a third person in confidence a communication in the nature of a character, such communication is *prima facie* privileged, and no action can be maintained by the servant against him on account of it, if made *bona fide* and without malice.

A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contain defamatory matter which without this privilege would be slanderous and actionable (*b*). This duty is not to be confined to legal duties which may be enforced by legal process, but must include moral and social duties of imperfect obligation (*c*). Indeed, this privilege in the matter of servants' characters arises from the duty (moral and not legal), which is cast by the requirements of society on the master, of stating fully and fairly the truth about his servant, whether in his favour or against him, and because masters should be as fully protected as possible if they honestly discharge their duty in speaking of the characters of those who have quitted their service, and acquainting those with the truth who are about to take them into their homes and service. "It is of importance to the public that characters should be readily given. The servant who applies for the character, and the person who is to take him, are equally benefited. Indeed, there is no class to whom it is of so much importance that characters should be freely given as honest servants. It is for that object that com-

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(*a*) *Carrol* v. *Bird*, 3 Esp. 201.

(*b*) A canon propounded by counsel during argument and adopted by Lord Campbell in *Harrison* v. *Bush*, 5 E. & Bl. 344, 348.

(*c*) Per Lord Campbell in *Harrison* v. *Bush* (*ubi sup.*).

munications are protected" (*d*). Again: "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits" (*e*).

Duty of Master to State the Truth Fairly and Honestly.—The employers, then, of domestic servants have a duty cast upon them to state fairly and honestly what they know of them when applied to by those who may be about to take them into their homes; and those who are about to employ them have a corresponding interest in knowing the truth concerning them, so that they may be rightly informed as to those who are coming to form part of their domestic household. Masters and mistresses should be freely, unreservedly, and truthfully outspoken as to their opinion of those servants who have left their service; not keeping back that which is unfavourable to them, nor wilfully speaking ill of them, nor recklessly exaggerating their faults and shortcomings. For while the law in the interests of society holds the communication of the character of a servant privileged, yet a deliberately stated falsehood would be evidence of malice, and would tend to deprive the communication of its privilege (*f*).

Facts Learnt after Discharge of Servant.—The master is in duty bound not only to state what he knows of the servant at the time of his discharge, but if he knows of any circumstance subsequently happening, of which the inquirer is entitled to be informed, also to tell him further what he conscientiously believes to be the case (*g*). This point was decided in the case of

(*d*) Per Wightman, J., in *Gardner* v. *Slade*, 18 L. J. Q. B. 334.

(*e*) Per Parke, B., in *Toogood* v. *Spyring*, 3 L. J. Ex. 347. This has been approved of in *Whiteley* v. *Adams*, 33 L. J. C. P. 89; and *Cowles* v. *Potts*, 34 L. J. Q. B. 247.

(*f*) *Post*, p. 900.

(*g*) Per Kelly, C.B., in *Jones* v. *Duke of Westminster* (Times, April 26, 1879).

Child v. *Affleck* (*h*); there the defendant, with whom the plaintiff had lived as servant, in answer to inquiries respecting her character, wrote a letter imputing misconduct whilst in her service, *and after she had left it*; the defendant also made similar parol statements to persons that had recommended the plaintiff to her. It was held that neither the letter itself nor the parol statements proved malice, and that consequently the letter was a privileged communication, and the plaintiff not entitled to recover.

Retractation of Character Given.—If a good character is at first given, and the master subsequently find out matters unfavourable to the servant, it is his duty to communicate his discovery to the person to whom the character has been given by way of retractation or correction of the character first given (*i*).

The privilege is not taken away even where the former master courts inquiries to be made by the new master. Thus, in *Gardner* v. *Slade* (*k*), the plaintiff, a domestic servant, about to enter the service of Mrs. M., referred Mrs. M. to the defendant, in whose service she had been. The defendant being then unwell, her husband answered the application, and gave the plaintiff a good character; and Mrs. M. took the plaintiff into her service. The defendant subsequently recovered, and, in a letter written to Mrs. M. on other matters, said that she (the defendant) had been much imposed upon in her kitchen. Mrs. M. in consequence made further inquiries of the defendant as to the plaintiff's character; and the defendant in answer spoke the words complained of, namely, that she suspected the plaintiff of dishonesty. The jury found the defendant intended by her letter to induce Mrs. M. to make inquiries as to the plaintiff, and found for the plaintiff, subject to leave to move for a non-suit. The Court subsequently made the rule for a non-suit absolute; Lord Denman, C.J., saying (*l*): "I think the privilege which protects a master in giving a character lasts as long as anything is discovered, before unknown to the master; as, for instance, if I give a good character to a servant, and next day discover the servant is dishonest, surely in such a case it becomes my duty to communicate my discovery to the person to whom I have given the character."

(*h*) 9 B. & C. 403.
(*i*) *Gardner* v. *Slade*, 13 Q. B. 799; 18 L. J. Q. B. 334.
(*k*) *Ubi sup.*
(*l*) 13 Q. B. 799; 18 L. J. Q. B. 334.

New Master Communicating with Former Master.—So, where a master writes a letter to the former master of the servant on whose recommendation he had taken him, to the effect that his conduct had not justified the character given of him, it is a privileged communication (*m*). This privilege is based upon the propriety of warning the former master that the character originally given by him to the servant is no longer deserved. So, too, if a servant knowing the character which his master will give of him, procures a letter to be written, not with a fair view of inquiring the character, but to procure an answer upon which to ground an action for a libel, no action can be maintained (*n*).

Communication to Other Servants.—The master can claim the protection of privilege in respect of communications made by him to the fellow servants of a servant who has been dismissed as to the reason for such dismissal (*o*).

Effect of Malice.—Where the servant can establish the malice of the master in making the communication of which he complains, then the privilege is taken away; for the master is found to have acted no longer in the proper and honest discharge of the moral duty cast upon him, but has deliberately and intentionally devised a wrong to another person, for which he should be justly held responsible. Thus, where a master officiously volunteers to inform a person into whose service he hears that a discharged servant of his is about to enter as to that servant's unfitness, it may be used against him as evidence of express malice towards the servant (*p*); for "upon the question whether a man who has written a libel injuring the character of a servant has acted *bona fide* or not, it makes a very material difference whether he volunteered to give the character, or had been called upon so to do. At all events, when he volunteers to give the character, stronger evidence will be required that he acted *bona fide* than in the case where he has given the character after being required so to do" (*q*).

There is an important distinction in their legal effect between words *prima facie* slanderous spoken by a master of a servant, and such words spoken by one person of another not in that

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(*m*) See *Dixon* v. *Parsons*, 1 F. & F. 24.

(*n*) Per Lord Alvanley in *King* v. *Waring*, 5 Esp. 15. See *Weatherston* v. *Hawkins*, 1 T. R. 110.

(*o*) *A. B.* v. *X. Y.* [1917] S. C. 15.

(*p*) *Pattison* v. *Jones*, 8 B. & C. 578.

(*q*) Per Littledale, J., in *Pattison* v. *Jones*, p. 585.

relationship. In the latter case malice in law which will ground an action is all that need be proved. "Malice in common acceptation means ill-will against a person, but in its legal sense it means a *wrongful act* done *intentionally*, without just cause or excuse. . . . If I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional" (*r*). But where an action for slander is brought on a communication of a servant's character, it is not to be considered as an action in the common way for defamation by words, but that the gist of it must be malice, which is not implied from the occasion of speaking, but should be directly proved (*s*); and no action lies for giving the true character of a servant, upon application made to his former master, to inquire into his character, with a view of hiring him, unless there should be *extraordinary circumstances of express malice* (*t*). This privilege, as before seen, is not confined to communications made on application, but even where they are volunteered, if not found to be malicious (*u*). Communications, therefore, as to the character of a servant will be deemed *prima facie* to be true, and not actionable, but privileged, and the onus of proving malice is cast upon the plaintiff, and before the question of malice can be submitted to the jury, the evidence must raise a probability of malice, and be more consistent with its existence than its non-existence (*x*). Indeed, the protection of the master (for the benefit of society) is carried a long way, and before the privilege of the communication is taken away, clear proof of malice must be forthcoming. It is the existence of the moral duty (before alluded to) cast upon the master, that makes his communication privileged; thus, where a master had dismissed a servant on a charge of theft, and warned his other servants against associating with him, and informed them of the reasons for dismissing him, his communication was deemed privileged (*y*). A servant cannot maintain an action against his former master for words spoken or a letter written by him in giving a character of the servant, unless the latter prove *the*

(*r*) Per Bayley, J., in *Bromage* v. *Prosser*, 4 B. & C. 247, 255.
(*s*) Per Lord Mansfield in *Edmondson* v. *Stevenson et uxor*, cited Bull. N. P. 8.
(*t*) Per Lord Mansfield in *Hargrave* v. *Le Breton*, 4 Burr. 2423, 2425.
(*u*) See *Whiteley* v. *Adams*, 33 L. J. C. P. 89.
(*x*) *Somerville* v. *Hawkins*, 20 L. J. C. P. 131.
(*y*) *Ibid.*

malice as well as the falsehood of the charge, even though the master make specific charges of fraud against him (*z*). Thus, though the statement should be untrue in fact, the master will be held justified by the occasion in making that statement, unless it can be shown to have proceeded from a malicious mind (*a*).

Publication in Presence of Third Person.—Where defamatory words (such, for instance, as impute fraud to a servant) are *prima facie* privileged, as being spoken with honesty of purpose, and to a person interested in the inquiry, the mere fact that they are spoken in the presence of a third person does not of necessity take away the privilege (*b*); so, where a master discharged his footman and cook, and they asked him his reason for dismissing them, and he told the footman in the absence of the cook that he charged him with robbing him along with the cook, and told the cook in the absence of the footman that he charged her with robbing him along with the footman; these communications were held privileged, both as regards the absent parties as well as those to whom they were respectively made (*c*). But the master must not exceed the occasion (*d*); and if he should deliberately seek an opportunity of making such communication before a third person, which might have been made in private, it is evidence of malice which may displace the privilege (*e*).

How Malice Established.—Malice may be established by various proofs; one may be that the statement is false to the knowledge of the party making it. In the majority of the cases in which servants have maintained actions against their masters for defamation of character, express malice has been substantiated by proof of the falseness of the communication being known to the masters. The master or mistress must believe the communication to be true. To entitle matters otherwise libellous to the protection which attaches to communications made in the fulfilment of a duty, *bona fides*, or, to use our own equivalent, honesty of purpose, is essential; and to this again two things are necessary: (1) that the communication be made not only

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(*z*) *Weatherston* v. *Hawkins*, 1 T. R. 110.
(*a*) Per Lord Denman, C.J., in *Fountain* v. *Boodle*, 3 Q. B. 5, 12.
(*b*) *Toogood* v. *Spyring*, 3 L. J. Ex. 347; *Taylor* v. *Hawkins*, 16 Q. B. 308; 20 L. J. Q. B. 313.
(*c*) *Manby* v. *Witt*; *Eastmead* v. *Witt*, 25 L. J. C. P. 294.
(*d*) See *Jones* v. *Thomas*, 53 L. T. 678.
(*e*) *Toogood* v. *Spyring*, 3 L. J. Ex. 347.

in the course of duty, that is, on an occasion which would justify the making it, but also from a sense of duty; (2) that it be made with a belief of its truth (*f*). Malice may also be shown by evidence of the communication not being made *bona fide* by the master. The following cases are a few instances of the above propositions.

Master Volunteering Information.—A person applied to a master for the character of his servant, the master gave the servant a bad character, the truth of which he was unable to prove; he also officiously stated to a former master a trivial act of misconduct on the part of the servant, in order to prevent him giving a second character. Malice on the part of the master was held to be rightly inferred (*g*). A master having discharged his servant, and hearing that he was about to be engaged by another person, wrote a letter to him, and informed him that he had discharged him for misconduct; the person communicated with in answer desired further information; the master then wrote a second letter, stating the grounds on which he had discharged the servant. In an action for libel on the second letter the jury found that it was not communicated *bona fide*, and found a verdict for the servant. The Court refused to disturb the verdict (*h*). A master in giving the character of his late servant to a person intending to take her, charged her with theft; and in support of the charge stated that she had borrowed money when she came into his service, and repaid it before she received any wages. In reply to an inquiry made afterwards by a relation of the servant, he admitted that the time when he paid the wages was entered in a book, which he produced, but refused to state what the time was; and on the same party remonstrating, and observing that the servant in consequence of her loss of character might have gone upon the town, he answered, "What is that to us?" It was held that this conduct was evidence to go to the jury (though slight) that the communication to the intended master was made maliciously (*i*). The plaintiff having been employed by the defendant as governess to her children for upwards of a year, during which the defendant twice recommended her to other similar situations was dismissed in an abrupt manner without

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(*f*) Per Cockburn, C.J., in *Dawkins* v. *Lord Paulet*, L. R. 5 Q. B. 102.
(*g*) *Rogers* v. *Clifton*, 3 B. & P. 587.
(*h*) *Pattison* v. *Jones*, 8 B. & C. 578.
(*i*) *Kelly* v. *Partington*, 4 B. & Ad. 700

cause assigned, and lost a new engagement in consequence of the defendant giving the following answer to an inquiry respecting her qualifications: "I parted with her on account of her incompetency and not being ladylike nor good-tempered"; to which a postscript was added, "May I trouble you to tell her that this is the third time I have been referred to. I beg to decline any more applications." The plaintiff gave general evidence of her competency, ladylike manners, and good temper. The previous applications referred to in the postscript were on the occasions on which the defendant had recommended the plaintiff to other situations. *No evidence was given for the defendant.* The judge at the trial directed that the communication was privileged, unless there was direct evidence that it was influenced by some malicious feeling; but that, if a *prima facie* case of intentional falsehood had been made out, the defendant ought to have shown, and could not under the circumstances have had much difficulty in showing, the assertion to have been made under a belief of its truth; and that the question was whether, looking at the whole case, there was sufficient proof that the defendant had been influenced by an improper feeling. It was held that the direction was right, and that there was evidence of malice for the jury (*k*).

If a married woman slander or libel a servant by knowingly giving him an untrue and defamatory character, she rendered her husband liable with herself to an action for damages at the election of the plaintiff; but by the Married Women's Torts Bill now before Parliament it is intended to relieve him of liability.

Liability for Giving False Character.—If a master knowingly give a false character of a servant to another who is about to hire him, and the servant afterwards rob or otherwise injure his new employer, an action for deceit lies against the master (*m*). But a false character *bona fide* believed to be true would not subject the giver to an action (*n*). The giving of false and fictitious characters has also been made a criminal offence; thus,

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(*k*) *Fountain* v. *Boodle*, 3 Q. B. 5. In an action for an alleged libel, contained in an answer to inquiries respecting the character of a servant, the plaintiff establishes a case to go to the jury, if there is any evidence, as a matter of fact, that the answer complained of was untrue to the defendant's knowledge, or as to matters of opinion, that the defendant in giving the character did not really act on the opinion which he professes to have entertained.

(*m*) See *Wilkin* v. *Reed*, 15 C. B. 192.

(*n*) See *Evans* v. *Collins*, 5 Q. B. 805; *Thom* v. *Bigland*, 8 Exch. 731; 9 Exch. 426 n.

if any person personate a master or mistress, or knowingly give a false, forged, or counterfeited character, he is liable on conviction to forfeit a penalty of £20, or in default of payment may be committed to prison with hard labour for a period not exceeding three months (*o*).

It is an indictable offence at common law to utter a forged document with intent to deceive, the forging of which is an offence at common law, and a testimonial to character is such a document (*p*).

(*o*) 32 Geo. III. c. 56, ss. 1 and 6.
(*p*) *Reg.* v. *Sharman*, 25 L. J. M. C. 51; *Reg.* v. *Moah*, 27 L. J. M. C. 204.

CHAPTER VI.

RIGHTS AND DUTIES OF MASTER AND SERVANT.

Duties of Servant.—When a servant engages with a master to enter his service, it is the servant's duty to enter upon and fulfil his engagement. If he does not fulfil his part of the bargain, he is liable to be sued for the breach, although in the case of domestic servants it would be nearly always futile and unwise to pursue the remedies provided by the law. The further duties of a servant to his master during the service, so far as a domestic servant is concerned, are—to be honest, respectful, and diligent (*a*); to evince due and proper care of his master's property, and so he will be rendered liable for gross negligence (*b*), and for fraud, or misfeasance (*c*); and to obey all lawful orders (*d*). The orders must be lawful, and within the scope of the servant's employment. A domestic servant need not obey an order which is attended with a risk (*e*), or which would necessitate his performing a task which he did not engage himself to do; a lady's maid, for instance, would not be obliged to milk the cows. If the order be lawful, though harsh, the servant must obey it, and where a maid-servant insisted, contrary to her master's orders, upon visiting her dying mother, and was dismissed, she was held to be properly dismissed because of her disobedience (*f*). The master has the right to expect, if not extraordinary diligence and care on the part of the servant, yet that he shall not persistently neglect his duty (*g*), and disobey his orders (*h*).

Action for Enticing a Servant Away.—The master has the right to the work and services of his servant, and if any one deprives him against his will of those services, by enticing or

(*a*) *Limland* v. *Stephens*, 3 Esp. 269.
(*b*) See *Countess of Salop* v. *Crompton*, Cro. Eliz. 777.
(*c*) *Turner* v. *Robinson*, 5 B. & Ad. 789; Bac. Abr. Mast. & Serv. M.
(*d*) *Turner* v. *Mason*, 14 L. J. Ex. 311; *Spain* v. *Arnott*, 2 Stark. 256.
(*e*) See *Turner* v. *Mason* (*ubi sup.*); *Woodley* v. *Metropolitan District Railway Co.*, 2 Ex. D. 384; 46 L. J. Ex. 521.
(*f*) *Turner* v. *Mason* (*ubi sup.*).
(*g*) *Pritchard* v. *Hitchcock*, 6 M. & G. 165.
(*h*) *Fillieul* v. *Armstrong*, 7 Ad. & El. 557.

taking away the servant, an action at his instance will clearly lie (*i*); also for detaining the servant after notice of the prior contract of service (*k*); and the strict relation of master and servant need not exist (*l*). It is not, however, actionable to induce a servant to leave his master's service at the expiration of the time for which he was hired, though the servant otherwise had no intention of leaving his master's service (*m*).

Seduction.—A master may maintain an action for debauching his servant, though he is in no way related to her in blood (*n*). The action for seduction is founded on the relationship of master and servant in respect of the loss of service, and therefore where the wife sued the seducer of her adopted daughter it was held that she could not recover as the daughter was the husband's servant and not hers (*o*). But where a daughter was alternately staying with her mother and with her mistress the mother was held entitled to recover (*p*).

Action for Injuries inflicted on Servant.—A master may also recover damages from a wrong-doer for injuries inflicted on his servant (*q*), and this action is based, like the last, on the loss of services; but it has been held that this right of action does not exist for injuries inflicted by the person with whom the servant had contracted in the course of the fulfilment of the contract (*r*). If the servant die from the injuries he has received, the master cannot maintain his action for damages (*s*). Medical expenses form an item of damages (*t*).

Duties of Masters.—As it is the duty of a servant who has engaged himself in a binding contract of service to enter and fulfil his part of the agreement, so is it the master's correlative duty to receive the servant into his service, and if he refuse to do so, except for some such good reason as the servant's misconduct, incompetency, or inability to perform his part of the

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(*i*) *Lumley* v. *Gye*, 22 L. J. Q. B. 463.

(*k*) *Blake* v. *Lanyon*, 6 T. R. 221; *De Francesco* v. *Barnum*, 45 Ch. D. 430; 60 L. J. Ch. 63; *Fred. Wilkins & Bros., Lim.* v. *Weaver*, [1915] 2 Ch. 322; 84 L. J. Ch. 929.

(*l*) *Sykes* v. *Dixon*, 9 Ad. & El. 693; *Lumley* v. *Gye* (*ubi sup.*); *Evans* v. *Walton*, L. R. 2 C. P. 615; 36 L. J. C. P. 307; *Bowen* v. *Hall*, 6 Q. B. D. 333; *De Francesco* v. *Barnum* (*ubi sup.*).

(*m*) *Nicol* v. *Martyn*, 2 Esp. 734.

(*n*) *Fores* v. *Wilson*, Peake, 55.

(*o*) *Peters* v. *Jones*, [1914] 2 K. B. 781; 83 L. J. K. B. 1115.

(*p*) *Dent* v. *Maguire*, [1917] 2 Ir. R. 59.

(*q*) *Hall* v. *Hollander*, 4 B. & C. 660.

(*r*) *Alton* v. *Midland Railway Co.*, 34 L. J. C. P. 292.

(*s*) *Osborn* v. *Gillett*, L. R. 8 Ex. 88; 42 L. J. Ex. 53.

(*t*) *Dixon* v. *Bell*, 1 Stark. 287. See 49 & 50 Vict. c. 48, s. 6.

contract, the servant may maintain an action against him for breach of the contract (*u*) On the authority of *Hochster* v. *De la Tour* (*x*), a servant may bring such action even before the date assigned for the beginning of the service, if the master announce his intention not to receive him into his employ. Not only must the master receive the servant into his service, but must keep him there during the specified period, and if he dismiss him within that time, except on justifiable grounds, he does so at his peril. There is no duty on the master to provide work for the servant (*y*); for the mere contract of hiring and service does not import that duty; there must be either some agreement between the parties that work must be provided, or the nature of the service is such as would compel the master to provide it (*z*).

There is also a duty on the master to protect the servant, and if he fails in that duty the Court may remove the servant from his control; thus, if a master or mistress has caused or encouraged or favoured the seduction or prostitution of a young servant under sixteen, the Court before whom the offence is tried and proved may remove the child out of his or her control (*a*).

Payment of Wages.—It is the duty of the master to pay the wages he has agreed to give in return for the services rendered. When master and servant have agreed, one to hire and the other to serve, they should be clear and explicit towards each other on the subject of wages; for by so doing much unpleasantness, and perhaps some litigation, will be saved. It must be borne in mind that service, however long continued, creates no claim for remuneration without a bargain for it, either express or implied from circumstances showing an understanding that there should be payment (*b*). There may be a valid contract of hire and service without any express or implied promise to pay for the service, for it not infrequently happens that board and lodging alone are the wages of hire (*c*); again, there may be a long-continued service without payment which would not entitle the person who has rendered it to any

(*u*) *Bracegirdle* v. *Heald*, 1 B. & Ald. 722.
(*x*) 22 L. J. Q. B. 455.
(*y*) *Emmens* v. *Elderton*, 4 H. L. 624; *Turner* v. *Sawdon*, [1901] 2 K. B. 653; 70 L. J. K. B. 897.
(*z*) See *Bunning* v. *Lyric Theatre*, 71 L. T. 396.
(*a*) 48 & 49 Vict. c. 69, s. 12.
(*b*) Per Martin, B., in *Reeve* v. *Reeve*, 1 F. & F. 280.
(*c*) *Rex* v. *Shinfield*, 14 East, 541.

wages or pecuniary compensation in the absence of an express or implied bargain to that effect (*d*). There must be evidence, supported by the circumstances of the services rendered, of a contract, either express or implied, to pay for the services rendered, otherwise there is no duty on the hirer to do so. Where there is an express contract to pay wages, then the matter is clear; but where there is no such direct contract, then the facts of the case must be left to the jury to say whether there has been an implied contract or not to pay wages. There is a marked distinction to be drawn between the case where a person works for a near relative, such as father, mother, brother, grandfather, and the like, and where he works for a stranger; for, unless in the former case there is an express contract for remuneration, no right to be paid will be inferred (*e*); but where work is done for strangers, much less direct evidence of a contract for remuneration would suffice.

If from the nature of the circumstances an implied promise can be made out, the servant will be entitled on a *quantum meruit* to a fair remuneration; but it is open to the defendant to produce evidence to the contrary effect, as that the plaintiff cohabited with him and was not his servant (*f*), or that the misconduct of the plaintiff rebutted any inference of an implied promise to pay (*g*). A servant can only recover on a promise to pay *wages*; and a promise to pay a *gratuity*, unless stipulated for as a portion of the wages, is no ground of action (*h*); but if a gratuity is stipulated for it can be recovered (*i*).

Where there has been a promise to pay an agreed sum, the servant cannot claim additional wages for the rendering of additional services, unless there has been some express or implied contract to that effect; so, where A comes as a servant into B's household, consisting of seven persons, and B increases his household to ten, thereby throwing additional work on A, A in the absence of an agreement to that effect is not entitled to an increase of wages (*k*).

(*d*) Smith, M. & S. 192; *Foord* v. *Morley*, 1 F. & F. 496; *Alfred* v. *Fitzjames*, 3 Esp. 3; *Hulse* v. *Hulse*, 25 L. J. C. P. 177.

(*e*) Wood, Law of Master and Servant, pp. 115, 121; Macd. M. & S. 145; and see *Davies* v. *Davies*, 9 C. & P. 87.

(*f*) *Bradshaw* v. *Hayward*, Carr. & M. 591.

(*g*) *Monkman* v. *Shepherdson*, 11 A. & E. 411.

(*h*) *Parker* v. *Ibbetson*, 27 L. J. C. P. 236; *Lake* v. *Campbell*, 5 L. T. 582.

(*i*) *Earl of Mansfield* v. *Scott*, 1 Cl. & F. 319.

(*k*) *Bell* v. *Drummond*, Peake, 45; *Frazer* v. *Hatton*, 26 L. J. C. P. 226.

The Truck Act (*l*), which prohibited "the payment in certain trades of wages in goods, or otherwise than in the current coin of the realm," does not apply to domestic servants; and, as a matter of fact, in some poorer households, young domestic servants are paid by being boarded, lodged, and clothed. When a considerable period has elapsed from the date of the wages having become due to the time when the claim is made, the Courts will presume, as a rule, that all the wages have been paid (*m*), or that the services were rendered on the footing that no payment was to be made (*n*). Claims for wages are within the Statute of Limitations (*o*), and are barred after a lapse of six years.

On the bankruptcy of the master, which does not of itself put an end to the contract of hiring and service (*p*), though it puts an end to the contract of apprenticeship, servants under a binding contract of service (*q*), in the employment of the master, are entitled to priority over the other creditors in the payment of their wages due for a period of time not exceeding four months (*r*), and for an amount not larger than £50 (*s*). The creditors, or the official receiver of a bankrupt's property, cannot insist upon the fulfilment of the contract by the servant (*t*).

Set Off Against Wages.—Wages are a specified reward for specified purposes; and therefore, if the specified work has been done, the full specified reward or remuneration is due, unless by some arrangement the servant has agreed that some deduction shall be made from the full amount due and payable. Accordingly, a master, in the absence of some special agreement, cannot set off to a claim for wages money paid for medical attendance on a servant (*u*), or for advances made by him to a servant under age for the purchase of non-necessaries, nor coach fare paid by him for her mother (*x*). Nor can he deduct from the servant's wages any loss he may have sustained

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(*l*) 1 & 2 Wm. IV. c. 37.
(*m*) *Sellen* v. *Norman*, 4 C. & P. 80.
(*n*) See *Gough* v. *Findon*, 7 Exch. 48 (per Parke, B., p. 50).
(*o*) 21 Jac. I. c. 16.
(*p*) *Thomas* v. *Williams*, 1 A. & E. 685.
(*q*) *Ex parte Glover*, 1 Mont. & Gr. Dig. Bkpt. Laws, 178.
(*r*) See *Ex parte Fox; Re Smith*, 17 Q. B. D. 4; 55 L. J. Q. B. 288
(*s*) Bankruptcy Act, 1914, s. 33 (1) (b).
(*t*) See *Gibson* v. *Carruthers*, 8 M. & W. 343.
(*u*) *Sellen* v. *Norman* (*ubi sup.*).
(*x*) *Hedgeley* v. *Holt*, 4 C. & P. 104. For coach fare, railway fare would now be substituted.

(as by breakages) through the accident, or even the negligence, of the servant (*y*), unless he has expressly so stipulated at the time of the hiring (*z*). If, however, he can prove negligence, in such a case he may either pay the wages in full and sue the servant for the loss; or leave the servant to sue for the wages, and then in the action counterclaim for the loss (*a*). The servant is entitled to wages for a period during which he is temporarily ill, though unable to perform his duties, unless the contract of service is rescinded at the time he falls ill (*b*).

Board Wages.—There is considerable misapprehension among many persons on the subject of board wages. Domestic servants on discharge on the payment of a month's wages in lieu of the customary notice, often ask for, and sometimes obtain, a sum which is called "board wages." This claim is quite unfounded, unless there has been a special agreement to that effect, which is not very probable (*c*). Board wages, properly speaking, is a weekly sum which is allowed them for their maintenance where the master does not provide for them. In some households masters do not provide food, &c., for their servants, but pay them this weekly sum, called "board wages," for their own convenience, as well as to prevent the servants from dealing on their credit with tradesmen. Wages are the remuneration for the work and labour supplied, and if the servant is discharged with his month's wages in lieu of his notice of a month (during which time he would have had to work unless summarily dismissed), he has got all to which he is entitled. A master is bound to support and provide for a servant only so long as the latter is in his service, and that obligation ceases on the expiry of the service. Again, it may be that the servant obtains a new master the day after he is discharged by the old; consequently, if board wages are paid him, he will obtain a sum of money which he will never need.

Recovery of Wages.—If the servant, on leaving his service, has not been paid his proper wages, the County Court is the fitting tribunal to which he should have recourse for their recovery, if they do not exceed £100 in amount. The consent of parties will give the Court jurisdiction over a larger sum.

(*y*) *Le Loir* v. *Bristow*, 4 Camp. 134.
(*z*) *Cleworth* v. *Pickford*, 7 M. & W. 320, per Lord Abinger.
(*a*) This remedy is available in the County Court as well as the High Court.
(*b*) *Cuckson* v. *Stones*, 28 L. J. Q. B. 25.
(*c*) *Gordon* v. *Potter*, 1 F. & F. 644; *Winstone* v. *Linn*, 1 B. & C. 460.

If the servant bring his action in the superior Court, and he recover less than £20, he is not entitled to his costs, unless the judge at the trial specially gives them to him (*d*).

The Councils of Conciliation Act, 1867 (*e*), which was passed to adjust differences between masters and workmen, does not extend to domestic servants, or servants in husbandry (*f*).

A justice of the peace has no power to hear and determine any dispute that may arise between master and servant as to the contract of hiring; for by the Employers and Workmen Act, 1875 (*g*), which gives Courts of summary jurisdiction the power as Courts of civil jurisdiction to hear and determine certain disputes between employers and workmen, domestic servants are expressly excluded from its operation.

Duty of Master to Supply Food.—The duty of a master to supply his servant with food does not exist at common law, but is the result of a contract, whether express or implied, between the hirer and hired. The breach of it formerly was the ground of a civil action only, except in the case of an infant servant of tender years (*h*), that is, one under sixteen years of age (*i*), in which case it was an indictable misdemeanour (*k*). Where the master has means of providing food for his servant, being one of tender years (*l*), and neglects to do so, and the servant dies of starvation, the master may be indicted for murder, for the law casts a duty upon him of providing food and sustenance for him (*m*). If a master refused to supply food for his apprentice, he could only be indicted at common law (*n*). To cure this defect of the law various enactments were passed, and by the Conspiracy and Protection of Property Act, 1875 (*o*), it is provided that

"where a master, being legally liable to provide for his servant or apprentice necessary food, clothing, medical aid, or lodging, wilfully and without

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(*d*) 30 & 31 Vict. c. 142, s. 5; 45 & 46 Vict. c. 57, s. 4. Jurisdiction up to £100 was conferred upon County Courts by 3 Edw. VII. c. 42, s. 3.
(*e*) 30 & 31 Vict. c. 105.
(*f*) Sect. 17.
(*g*) 38 & 39 Vict. c. 90, s. 10.
(*h*) *Rex* v. *Ridley*, 2 Camp. 650.
(*i*) *Reg.* v. *Sloane et uxor*, 33 Sess. Pap. (Cent. Crim. Ct.) 482.
(*k*) *Rex* v. *Friend*, R. & R. C. C. 22.
(*l*) *Reg.* v. *Chandler*, 24 L. J. M. C. 109.
(*m*) See *Reg.* v. *Marriott*, 8 C. & P. 425.
(*n*) *Reg.* v. *Gould*, 1 Salk. 381.
(*o*) 38 & 39 Vict. c. 86, s. 6. By sect. 11 it is provided that the husbands and wives of the respective parties to the contract of service shall be considered as competent witnesses.

lawful excuse refuses or neglects to provide the same, whereby the health of the servant or apprentice is or is likely to be seriously or permanently injured, he shall on summary conviction be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding six months, with or without hard labour."

If a master neglect to supply food, &c., to a servant who is so enfeebled and helpless that he cannot provide for or take care of himself, and is unable to withdraw himself from his master's control, and the death of the servant is attributable to such neglect, the master may be indicted for manslaughter; but a wife is not equally liable with her husband for these offences, unless she has been supplied with money for the support of the servant, and she has wilfully neglected to afford it (*p*).

Medical Attendance.—A master is not legally bound to provide medicine for his sick servant (*q*), or surgical attendance for one who has met with an accident, though it is otherwise in the case of an apprentice (*r*). In an early case (*s*), it is true that Lord Kenyon held that a master was bound to provide medicine for his servant whilst living under his roof, but that is no longer the law, although it may be his duty under certain circumstances to call in the panel doctor and to take reasonable steps to relieve the servant (*t*). He is not liable even on an implied contract when a medical man is called in by one of the servants to attend him or her (*u*). But slight evidence is sufficient to fix him with liability; thus, where a servant became ill in consequence of a service away from her master's family, and called in a surgeon, and after that the master sent his own doctor, and his wife knew of the first surgeon's attendance and expressed no disapprobation, the master was held liable to pay for the attendance of the surgeon called in by the servant (*x*). The servant who is taken ill or injured becomes legally chargeable to the union in which he is stricken down (*y*).

Indemnification of Servant.—The master has cast upon him the duty of indemnifying his servant from the consequences of

(*p*) *Rex* v. *Saunders*, 7 C. & P. 277.
(*q*) *Wennall* v. *Adney*, 3 B. & P. 247.
(*r*) *Reg.* v. *Smith*, 8 C. & P. 153.
(*s*) *Scarman* v. *Castel*, 1 Esp. 270.
(*t*) *M'Keating* v. *Frame*, [1921] S. C. 382.
(*u*) *Cooper* v. *Phillips*, 4 C. & P. 581. In this case the surgeon was not the regular doctor of the defendant's family.
(*x*) *Cooper* v. *Phillips* (*ubi. sup.*).
(*y*) See *Wennall* v. *Adney* (*ubi sup.*).

obeying his lawful orders. The principle upon which this duty is cast upon the master is, that a principal is bound to indemnify his agent who acts on his behalf and carries out his order. It is, of course, a requisite that the order shall be lawful, for if the servant perpetrates even on his master's behalf that which is clearly a crime or a wrong, he does so at his own risk, and cannot expect to be indemnified, for he ought not to have carried out the order, and there is no contribution among tort-feasors. It has been held that where the servant in obeying his master's orders commits a *malum prohibitum*, then the master must indemnify the servant; but where the servant commits a *malum in se*, of which he was perfectly aware, then there is no obligation on the master to indemnify him. If the above proposition has ever been the law it cannot be deemed to be so now. The true principle would seem to be that if a servant obeying the orders of his master does an unlawful act through ignorance of fact and suffers loss or damage in consequence of such obedience, he is entitled to be indemnified by his master in respect of such loss, for in such a case he could not rightly be held to be a joint tort-feasor. If the servant, as a matter of fact, thought he had a right to do what he was ordered to do, he ought to be held harmless for the consequences of his obedience. Thus, if A sell his horse to B and send his servant C (who is ignorant of the sale) to get back the horse from B's stable, and C has it delivered up to him, and the horse is injured on the road and C is sued and cast in damages, C is entitled to maintain an action for indemnity against A (*z*). But if the servant act with the full knowledge of the facts and carries out the illegal orders of his master, even though they may not appear to him to be illegal, he cannot maintain an action for indemnity in such a case. If the servant act *contrary* to his master's orders and is thereby damnified, he alone must bear the loss (*a*); for no man should be made liable for the acts of another which he has neither authorized nor adopted.

Compensation for Injuries.—It now remains to consider the important question of the liability of a master to indemnify a servant for the injuries the latter has received in his service. It must be premised that the Employers' Liability Act, 1880 (*b*),

(*z*) See *Adamson* v. *Jarvis*, 4 Bing. 66; *Betts* v. *Gibbins*, 2 A. & E. 57; *Dixon* v. *Fawcus*, 30 L. J. Q. B. 137.

(*a*) *Grylls* v. *Davies*, 2 B. & Ad. 514. (*b*) 43 & 44 Vict. c. 42.

has no application to purely domestic servants. The main feature of the Act is to deprive the master or employer of the defence of alleging that the servant injured by another of his servants was in one common employment in cases where the injured servant was obeying the orders either of the master or of some responsible person placed in authority by the master or employer (*c*). But this defence still holds good in the case of domestic servants.

Gardeners were the first domestic servants brought within the provisions of the Workmen's Compensation Act, 1897 (*d*), through the operation of the Workmen's Compensation Act, 1900 (*e*), and the Act of 1906 defined workmen as meaning any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, is oral or in writing, but the term does not include a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business (*f*). The principle of the Act of 1897 is that a workman within its provisions who is injured in the course of his employment is to be compensated therefor, though the employer has not been guilty of any neglect of duty towards him, nor has employed defective plant, machinery, or works, nor has compelled him in the course of the employment to carry out the work which has led to his injury. If the injury is the result of serious and wilful misconduct no compensation is allowed, unless the injury results in death or serious and permanent disablement (*g*). If such workman dies in consequence of such injury, his "dependants" are entitled to compensation. A discussion of the sections of this Act, and the decisions upon them would be foreign to the scope of this work, therefore, for the method of recovering and the amount of compensation, and the general principles underlying it, the reader is referred to the different treatises on the subject.

National Insurance Act, 1911.—Domestic servants come within the very broad area covered by the provisions of this Act (*h*), as being in "employment in the United Kingdom under any contract of service or apprenticeship, written or oral, whether expressed or implied." By means of weekly payments

(*c*) Sect. 1.
(*d*) 60 & 61 Vict. c. 37.
(*e*) 63 & 64 Vict. c. 22, s. 1 (3).
(*f*) 6 Edw. VII. c. 58, s. 13.
(*g*) Sect. 1 (2) (c).
(*h*) 1 & 2 Geo. V. c. 55.

deducted from their wages by the employer with an additional sum provided by the employer and an addition by the State, funds are provided in order to pay benefits during sickness, and other benefits, in accordance with schemes arranged between the Ministry of Health and approved societies of which domestic servants become members.

Common Law Liability of Master.—The principle of the liability and immunity of a master is the obligation cast upon him of taking all reasonable precautions to secure the safety of his servant (*i*); but at the same time the mere relation of master and servant does not imply a contract on the part of the master to take care not to expose the servant to extraordinary danger and risk in the course of employment (*k*).

When Master not Liable.—The master is not liable at common law to his servant for injuries inflicted by fellow servants in the ordinary discharge of their duty (*l*). A servant, when he engages to serve a master, impliedly undertakes, as between himself and his master, to run all the ordinary risks of the service (including the risk of negligence on the part of a fellow servant when he is acting in the discharge of his duty) as a servant of him who is the common master of both, and the the master is not in general bound to indemnify him against the consequences of injuries sustained in the ordinary discharge of the duties for which he was hired; that is, if the master provide competent fellow servants, and means and appliances reasonably proper and adapted to the work in hand (*m*). The test of the liability or non-liability of the master is whether at the time of the injury the servant injured was or was not, so far

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(*i*) *Brydon* v. *Stewart*, 2 Macq. H. L. Cas. 30.

(*k*) *Riley* v. *Baxendale*, 30 L. J. Ex. 87.

(*l*) *Priestley* v. *Fowler*, 3 M. & W. 1; *Hutchinson* v. *Newcastle and Berwick Railway*, 19 L. J. Ex. 296; *Wigmore* v. *Jay*, 19 L. J. Ex. 300. This case is no longer law, except as to domestic servants. In the case of *Priestley* v. *Fowler*, Lord Abinger, C.B., in his judgment said: "If the master be liable to the servant in this action, the principle of the liability will be found to carry us to an alarming extent. . . . The master, for example, would be liable to the servant for the negligence of the chambermaid for putting him into a damp bed; for that of the upholsterer for sending in a crazy bedstead, whereby he was made to fall down while asleep, and injure himself; for the negligence of the cook in not properly cleaning the copper vessels used in the kitchen; of the butcher, in supplying the family with meat of a quality injurious to the health; of the builder, for a defect in the foundation of the house, whereby it fell, and injured both the master and the servant by the ruins. . . . In truth, the mere relation of the master and the servant never can can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself."

(*m*) Smith, M. & S. 240; *Hutchinson* v. *Newcastle and Berwick Railway Co.*, 19 L. J. Ex. 296.

as the injuring servant was concerned, a stranger to the master, that is, whether the risk he ran was incidental to his employment. Where the servant can be said to have received his injuries at the hands of a fellow servant, while engaged with that fellow servant in an employment common to them both on behalf of their master, then the latter is not liable. An upper servant who has the control and ordering of those under him or her is equally a fellow servant so as to render the master immune (*n*).

Common Employment.—It is not, however, necessary for this purpose that the servant causing and the servant sustaining the injury should both be engaged in performing the same or similar acts (*o*); provided they are engaged in a common employment, that is, with a common master (*p*), they need not be engaged in effecting the same common immediate object, but may be occupied in different departments of duty (*q*). The joint occupaton of premises by two masters does not make the employment of servants thereon by each of them common employment (*r*).

If a master does his best to obtain competent servants, that is all he is expected to do; "he is not bound to warrant their competency" (*s*); and in an action against the master for an injury done by one of the servants to another, the question is not whether the servant was competent, but whether the master exercised due care in employing him (*t*).

Volenti non fit injuria.—Where the servant is well acquainted with the use and nature of the instrument or machine which he has to use in his work, and he is injured by it, his master will not be held liable unless the injury has been caused by the personal negligence of the latter (*u*), or by his breach of a statutory duty (*x*). He also will not be liable where the dangerous and risky nature of the employment is well known

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(*n*) See *Wilson* v. *Merry*, L. R. 1 H. L. Sc. 326.
(*o*) *Bartonshill Coal Co.* v. *Reid*, 3 Macq. H. L. Cas 266; Per Lord Cranworth, C., p. 295.
(*p*) *Johnson* v. *Lindsay*, [1891] App. Cas. 371, explaining Lord Cairns' observations in *Wilson* v. *Merry* (*ubi sup.*).
(*q*) *Morgan* v. *Vale of Neath Railway Co.*, L. R. 1 Q. B. 149; 35 L. J. Q. B. 23.
(*r*) *Vose* v. *Lancashire & Yorkshire Ry. Co.*, 27 L. J. Ex. 249.
(*s*) *Tarrant* v. *Webb*, 25 L. J. C. P. 261.
(*t*) *Ibid.*
(*u*) *Dynen* v. *Leach*, 26 L. J. Ex. 221.
(*x*) See *Britton* v. *Great Western Cotton Co.*, L. R. 7 Ex. 130; 41 L. J. Ex. 99.

to the servant (*y*). To entitle the servant to recover he must allege and prove both that his master was negligent and he himself was ignorant of the risk (*z*). The master is not liable where the servant is not bound to obey. This is cognate to the preceding rules, for a risk accepted deprives the servant of his remedy. A master is not liable to a servant for injuries sustained in the performance of orders which he was not bound to obey; as, for example, a servant is not bound to risk his life or limb in obedience to his master's orders; and if he does so, he must take the consequences. If an adult female servant, such as a lady's maid, were ordered to stand outside an upper window and clean it, or to hold a horse, and she were in consequence to sustain an injury, neither she, nor her representatives in the case of her death, would be held (it is submitted) capable of maintaining an action for the injury apart from the negligence of her master, for she might be said voluntarily to have incurred the risk of injury (*a*); but the mere fact of undertaking or continuing in a dangerous employment is not conclusive evidence that the servant voluntarily incurred the risk, and so in the event of injury become disentitled to recover compensation (*b*); and if such pressure is brought to bear upon the servant by the master that he could not be said to be a free agent, then the master would be held liable (*c*). So, also, if the servant choose to work with an instrument or machinery which he knows to be dangerously imperfect and defective, and is injured by the defective instrument or machine, the master is not liable, on the principle of the maxim *volenti non fit injuria* (*d*); for knowing of his risk he elects to abide by it. But it has been held that if the servant discovers the defect and informs his master of it, and the latter induces him to remain at his work by promising to repair the defect, and the servant is injured, he will be entitled to recover, for he might reasonably suppose that the defect would be remedied (*e*).

(*y*) *Potts* v. *Plunket*, 33 L. T. 111.

(*z*) *Griffiths* v. *London & St. Katherine Docks Co.*, 13 Q. B. D. 259; 53 L. J. Q. B. 504.

(*a*) *Thomas* v. *Quartermaine*, 18 Q. B. D. 685; 56 L. J. Q. B. 349; *Yarmouth* v. *France*, 19 Q. B. D. 647; 57 L. J. Q. B. 7; *Membery* v. *G. W. Railway Co.*, 14 App. Cas. 179; 58 L. J. Q. B. 563.

(*b*) *Smith* v. *Baker*, [1891] App. Cas. 325; 60 L. J. Q. B. 683.

(*c*) See *Thrussell* v. *Handyside*, 20 Q. B. D. 359; 57 L. J. Q. B. 347.

(*d*) *Senior* v. *Ward*, 28 L. J. Q. B. 139; *Skipp* v. *Eastern Counties Railway*, 23 L. J. Ex. 23

(*e*) *Holmes* v. *Clark*, 31 L. J. Ex. 356, affirming 30 L. J. Ex. 135. See *Smith* v. *Baker* (*ubi sup.*).

Contributory Negligence of Servant.—Where a servant contributes by his own negligent conduct to the accident which injures him, and by the exercise of ordinary care and prudence would have escaped any mishap at all, he is debarred from seeking compensation from his master (*f*). This is a principle which is not confined to the relation of master and servant, but is well recognized in other branches of the law.

Person Injured a Volunteer.—A volunteer, or one who does not stand to the master in the position of actual servant, who is injured by participating in the work for which he volunteers his services in process of its accomplishment by the servants of the master, cannot, because he is in the position of a stranger and not hired servant, stand in any better position than the hired servants whom he was assisting, and so impose a more onerous burden upon the master than he ever undertook to bear (*g*). The volunteer is for the time being acting in the common employment of the master whom he seeks to fix with liability. But where the injured person is not a mere licensee or volunteer, but has an interest in common with the master of the servant, then he will be entitled to compensation for the injuries inflicted on him (*h*).

When Master Liable.—Where the master by advice, or personal presence and interference, takes part in the work or labour, during the course of which the servant is injured through the negligent interference of the master, the latter is held liable (*i*). So where the master works with the servant as a fellow servant, and injures him in the course of the employment by his negligence, he is liable (*k*).

Where a domestic or household servant brings an action of negligence against his master for personal injuries resulting from the unsafe state of the premises, he must allege not only that the master knew of their unsafe state, but that he himself was ignorant of the danger (*l*).

The master is also personally liable if he do not exercise

(*f*) *Senior* v. *Ward*, 28 L. J. Q. B. 139. See *Blenkinsop* v. *Ogden*, [1898] 1 Q. B. 783; 67 L. J. Q. B. 537.

(*g*) *Degg* v. *Midland Railway Co.*, 26 L. J. Ex. 171; *Potter* v. *Faulkner*, 31 L. J. Q. B. 30.

(*h*) *Wright* v. *London and North-Western Railway Co.*, L. R. 10 Q. B. 298; 1 Q. B. D. 252; 45 L. J. Q. B. 570; *Bachelor* v. *Fortescue*, 11 Q. B. D. 474.

(*i*) *Roberts* v. *Smith*, 26 L. J. Ex. 319; *Ormond* v. *Holland*, El. Bl. & El. 102.

(*k*) *Ashworth* v. *Stanwix*, 30 L. J. Q. B. 183.

(*l*) *Griffiths* v. *London and St. Katherine's Dock Co.*, 13 Q. B. D. 259; 53 L. J. Q. B. 504.

reasonable care in selecting his servants (*m*). If one incompetent servant injure another, the latter may recover against his master because of his negligence, if brought home to him, and not on the ground of the incompetency of his fellow servant. If the servant was aware of the incompetency of his fellow servant, and yet remained on, and was injured by him, he would find it difficult to maintain the action against his master (*n*).

When a servant is killed under circumstances which, if he had survived, would have entitled him to maintain an action against the master, Lord Campbell's Act (*o*) enables his personal representative (wife, husband, parent, child, executor, or administrator, as the case may be) to bring an action to recover damages within twelve months from his death.

(*m*) *Hutchinson* v. *York, Newcastle and Berwick Railway Co.*, 19 L. J. Ex. 296.

(*n*) See *Saxton* v. *Hawksworth*, 26 L. T. 851.

(*o*) 9 & 10 Vict. c. 93.

CHAPTER VII.

RESPONSIBILITY OF MASTER FOR ACTS OF SERVANT.

The principle on which a master can be made liable for the acts or conduct of his servant is that which underlies the relations of principal and agent, namely, *qui facit per alium facit per se*. The mere relation of master and servant does not clothe the latter with a capacity to pledge the former's credit against his consent, or even without his knowledge; and if a servant take up goods on credit without the leave of his master, no liability on the transaction attaches to the latter. If a master hold out a servant as his authorized and accredited representative, he must accept responsibility for his acts. The master, however, is at times liable even when he cannot rightly be said to hold out his servant as his agent (*a*).

Liability on Contracts.—The liability of the master on the contracts entered into by the servant may arise in three ways:

(a) By adoption by the master of the servant's contracts.
(b) By giving express authority to servant to contract.
(c) By creating an implied authority to servant to contract.

(a) If a servant enter into a contract in his master's name, which is adopted and ratified by the master, the latter will be liable on it; for *omnis ratihabitio retrotrahitur et mandato priori æquiparatur* (*b*). It is necessary that the adoption should go to the whole of the contract, and not only part of it (*c*); and that such contract should have been made expressly by the servant as agent (*d*).

(b) Express authority to contract may be given by deed, writing, or word of mouth, and may be either of a *general* or *special* nature; and when of the latter, is confined to a particular instance or object. When the authority of the servant to con-

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(*a*) See *post*, p. 925.
(*b*) Story on Agency, s. 239.
(*c*) See *Ferguson* v. *Carrington*, 9 B. & C. 59; *Ramazotti* v. *Bowring*, 29 L. J. C. P. 30.
(*d*) *Ramazotti* v. *Bowring* (*ubi sup.*).

tract is established, the master at once becomes liable (*e*). To bind the master the servant must confine himself within the scope of his authority, and not enter into dealings which are beyond it. If the terms of the authority are reduced into writing, but little difficulty can arise as to the scope of the servant's powers; but in the ordinary everyday relation of master and domestic servant, the terms would never be declared by a deed, and but rarely be reduced into writing, they would be most frequently given by word of mouth. The effect of such orders will be best described in the next section.

(c) Where the authority of a servant to bind his master upon contracts arises merely by implication, the general rule is, that the authority of a servant is co-extensive with his usual employment and the scope of his authority is to be measured by the extent of his employment (*f*). The authority to pledge his credit may be assumed from the conduct of the master. Where a master, by a course of dealing, holds out his servant as his agent, he will become responsible and liable for the acts done within the scope of his authority and agency. Previous dealings with any particular servant are not necessary; but if his master hold him out as his agent, and send him into the world as his servant, and he enters into a bargain, the benefit of which accrues to the master, the latter will be deemed to have given that servant an implied authority to enter into such a bargain, unless the servant shall have represented to the third person that he was contracting in his own name (*g*). If a servant is commissioned to transact business for his master, but has no particular instructions given to him, nor any particular means to carry out his master's orders, he is usually deemed invested with the proper powers and appropriate means to carry out the business intrusted to him; thus, if a servant be sent by his master to purchase goods on his behalf, but is not furnished by him with money, he will in all probability be deemed clothed with an authority to pledge his master's credit (*h*). If a master permits a servant to purchase goods for him on credit, and on one particular occasion the servant receives money from him to purchase goods of a similar nature, and embezzles the money, but orders the goods, the master will be liable to pay for their

(*e*) *Langan* v. *Great Western Railway Co.*, 30 L. T. 173.
(*f*) Smith, Merc. Law, 136.
(*g*) *Rimell* v. *Sampayo*, 1 C. & P. 254.
(*h*) *Tobin* v. *Crawford*, 12 L. J. Ex. 690; *Miller* v. *Hamilton*, 5 C. & P. 433; see also *Smith* v. *M'Guire*, 3 H. & N. 563.

price by reason of the previous course of dealing (*i*). But where the master is in the habit of supplying his servant with the money to pay for the goods he orders, and the servant steals or loses the money, but orders the goods, he is not liable (*k*).

Implied Authority Limited to Particular Business.—The implied authority to pledge the master's credit is, however, limited to the particular business, and cannot be extended to collateral transactions (*l*), or to matters which are clearly outside of and not incidental to the scope of the servant's employment (*m*). A servant, acting within the scope of his employment, may be treated as the general agent of his employer for all purposes connected with the employment, and will bind him (*n*); that is, where he is put into a position of trust and responsibility, he can, in his representative capacity, bind his master by orders and directions given by him within the scope of his trust (*o*). As a result, the servant of a horse-dealer has been held capable of binding his master by giving a warranty (*p*), though he had received strict orders not to give it, on the ground of an authority of necessity, for without such power he could not carry out the transactions he was employed to negotiate (*q*). But the servant must not exceed his authority, and if he does, his master is not bound by his representation or course of conduct (*r*); and where a servant's authority is specially limited by his master, his agency is a special one, and only within the limits of such agency will his acts bind his master (*s*). What is the extent of the servant's authority is in each case a question for the jury (*t*).

Liability not Limited by Private Arrangement.—If the master holds the servant out as his general agent, he will be liable for contracts entered into by the servant within the scope of his employment, though against his orders. His liability cannot be limited or controlled by any private arrangement or agreement between himself and his servant; and a master was

(*i*) See *Nickson* v. *Brohan*, 10 Mod. 109; also *Wayland's Case*, 3 Salk. 234; and *Rusby* v. *Scarlett*, 5 Esp. 76; *Hazard* v. *Treadwell*, 1 Stra. 506.

(*k*) See *Stubbing* v. *Heintz*, Peake, N. P. 66.

(*l*) *Howard* v. *Chapman*, 4 C & P. 508.

(*m*) *Cox* v. *Midland Counties Railway Co.*, 18 L. J. Ex. 65.

(*n*) *Walker* v. *Great Western Railway Co.*, L. R. 2 Ex. 228; 36 L. J. Ex. 123; *Howard* v. *Sheward*, L. R. 2 C. P. 148; 36 L. J. C. P. 42; but see *Knight* v. *North Metropolitan Tramway Co.*, 78 L. T. 227.

(*o*) *Richardson* v. *Cartwright*, 1 C. & K. 328; *Langan* v. *Great Western Railway Co.*, 30 L. T. 173.

(*p*) *Alexander* v. *Gibson*, 2 Camp. 555; and see *Baldry* v. *Bates*, 52 L. T. 620.

(*q*) *Howard* v. *Sheward* (*ubi sup.*).

(*r*) *Helyear* v. *Hawke*, 5 Esp. 72.

(*s*) *Ward* v. *Evans*, 2 Lord Raym. 928; *Waters* v. *Brogden*, 1 Y. & J. 457.

(*t*) *Reynell* v. *Lewis*, 16 L. J. Ex. 55.

held liable under the following circumstances: He had entered into an agreement to allow his groom so much a year for providing shoes and medicine for his horses, but the groom spent the money in other things; the farrier sent in his bill, and sued him for the amount of his debt. Lord Kenyon held in that case that unless the farrier knew of the agreement, and expressly trusted the groom, the agreement was no defence to the action, for a tradesman has nothing to do with any private agreement between the master and servant (*u*). It is otherwise where the tradesman or person dealing with the servant is aware of the private arrangement between him and his master, for if he trusts him, he relies on the servant's and not the master's credit (*x*).

No Liability Apart from Express or Implied Authority.—No liability on the part of the master for the servant's contracts exists where he has not given the servant express or implied authority to pledge his credit, or where he has terminated with notice the servant's authority to pledge it. If a master neither expressly nor impliedly authorizes his servant to pledge his credit, he is not liable for any contracts which the servant may make in his name, for liability in such a case would be contrary to all principles of law and justice (*y*). Sir William Blackstone (*z*) says on this point: "If I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes upon trust; for here is no implied order to the tradesman to trust my servant." The succeeding cases illustrate the relations of masters to third persons created by the acts of their domestic servants. The defendant contracted with the plaintiff to be served by him with meat at a certain price for ready money; his cook was accustomed to order the meat, and when the bill amounted to a few shillings or a guinea, used to pay it, generally on Monday morning, and the defendant always gave her the money to pay; this course of dealing continued for a long time till the defendant got a cook who embezzled the money, and did not pay the plaintiff's bills; under these circumstances the defendant was held not liable for their amount (*a*). A butler ordered brandy

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(*u*) *Precious* v. *Abel*, 1 Esp. 350; see also *Rimell* v. *Sampayo*, 1 C. & P. 254; but see to the contrary, *Wright* v. *Glyn*, [1902] 1 K. B. 745; 71 L. J. K. B. 497.
(*x*) *Howard* v. *Braithwaite*, 1 V. & B. 209.
(*y*) *Wright* v. *Glyn* (*ubi sup.*).
(*z*) 1 Com. 430.
(*a*) *Stubbing* v. *Heintz*, Peake, 66; see also *Pearce* v. *Rogers*, 3 Esp. 214.

in his master's name, which was consumed by him and the cook without the master being privy to the order, delivery, or consumption, and there was no evidence that the servant had authority to order the goods; the master was held not liable (*b*). The defendant ordered of a tailor two suits of livery a year for her coachman, and the tailor supplied one; but, at the desire of the coachman, supplied plain clothes instead of the other; she was held only liable for the livery actually supplied, and entitled to set off against a subsequent account for clothes the price of a suit of livery which had been supplied and paid for, but taken back by the tailor from the coachman (*c*). Again, a servant injured his master's carriage, and without acquainting or waiting for the orders of his master, left it at a coachmaker's, a stranger to his master, and the coachmaker refused to give up the carriage without being paid the price for his repairs; the master was successful in an action for the recovery of the carriage, and the coachmaker was held to have no claim against him for the amount of his bill (*d*).

Mere User of Goods will not Create Liability.—The mere fact of a master using the goods obtained by the servant will not of itself render him liable to pay for them, where the course of dealing by the master did not amount to an authority to the servant to pledge his credit. It is, however, strong *prima facie* evidence against him, unless he can show that credit was given to the servant, or that the latter received money from him to buy the goods, and so had no authority from him to pledge his credit (*e*). Where a servant is left in charge of children with a sufficient allowance for their support, he has no authority to pledge his master's credit for necessaries or goods supplied for their support (*f*). Further, a master is not liable for the contracts of his servants when they have an express authority and exceed their powers; or where they have an implied authority, and act beyond the scope of their employment (*g*). Neither is he liable when the person transacting business with the servant knows who the master is, yet gives credit to the servant (*h*).

(*b*) *Maunder* v. *Conyers*, 2 Stark. 281.
(*c*) *Hunter* v. *Dowager Countess of Berkeley*, 7 C. & P. 413.
(*d*) *Hiscox* v. *Greenwood*, 4 Esp. 174.
(*e*) *Pearce* v. *Rogers*, 3 Esp. 214.
(*f*) Per Cockburn, C.J., in *Atkyns* v. *Pearce*, 26 L. J. C. P. 252.
(*g*) See *Cox* v. *Midland Counties Railway Co.*, 18 L. J. Ex. 65.
(*h*) See *Thomson* v. *Davenport*, 9 B. & C. 78.

Notice of Termination of Authority.—When the authority of a servant to act as agent for his master ceases, the power to bind the master by his dealings ceases also; and those who contract with the servant knowing of the cessation and determination of such authority, contract with him on his credit, and at their peril. This proposition holds good not only in such cases where the authority of the servant is express, but where it is implied. If a master has by his acts given his servant implied authority to pledge his credit to a tradesman, and subsequently notifies to that tradesman his revocation of the servant's authority, he will not be held liable for any subsequent credit transactions effected in his name by the servant with the tradesman (*i*). Notice of the revocation must be brought home personally to the third person (*k*); and mere notice of withdrawal to the servant alone would be insufficient to protect the master (*l*). Constructive notice, however, may be evidenced by such facts as lapse of time, not sending in accounts, from which knowledge of the want of authority on the part of the servant might be inferred (*m*). The discharge of the servant, unless known to the third person, would not seem to be an exoneration of the master (*n*); though the lapse of a considerable period from the last order would raise a presumption of discharge (*o*). The death of a master operates as a revocation of the servant's authority, and any acts of the servant after the death of the master would not bind the representatives of the latter (*p*).

Liability for Torts of Servant.—The principle that he who employs another to transact his business should be affected with responsibility for the acts of his agent as though they were his own, renders a master liable for the tortious acts of his servant, if done as his servant, and in the course of his employment, or as incidental to his employment (*q*); for a master is bound to indemnify the public against the wrongful or negligent acts of himself or his servants (*r*); for the master chooses the servant and gives him the order which he is bound to obey (*s*). The

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(*i*) *Chappell* v. *Bray*, 30 L. J. Ex. 24.
(*k*) *Gratland* v. *Freeman*, 3 Esp. 85; *Summers* v. *Solomon*, 7 El. & Bl. 879.
(*l*) *Trueman* v. *Loder*, 11 A. & E. 589.
(*m*) *Stavely* v. *Uzielli*, 2 F. & F. 30.
(*n*) *Anon.* v. *Harrison*, 12 Mod. 346; *Aste* v. *Montague*, 1 F. & F. 264.
(*o*) *Stavely* v. *Uzielli* (*ubi sup.*).
(*p*) See *Smout* v. *Ilbery*, 12 L. J. Ex. 357.
(*q*) *Ruddiman* v. *Smith*, 60 L. T. 708.
(*r*) *Michael* v. *Alestree*, 2 Lev. 172; *Bartonshill Coal Co.* v. *Reid*, 3 Macq. H. L. Cas. 266.
(*s*) *The Halley*, L. R. 2 P. & D. 193; 37 L. J. P. M. & A. 33.

relationship of master and servant must be clearly ascertained and proved; but when once proved the master is liable for the servant's negligence. Where the negligence of a servant is the effective cause of damage to another person, the master is liable though the actual proximate cause is the negligence of some third person, for whose acts the master might not be *prima facie* liable (*t*).

Grounds for Liability.—The principle of the maxim *respondeat superior* applies to this liability of the master; but there seems to be a double element in this liability. The master is liable not only as principal for the acts of his agent, but even under circumstances in which the servant could in no sense be called his agent, as where the servant was acting contrary to his commands, but was engaged in his service. In such a case his liability, it is suggested, would seem to be based upon the natural justice of the principle that where one of two innocent persons must sustain a loss, he who enabled the loss to be brought about should be the party to sustain it (*u*). The liability of the master is not confined only to the negligent acts of his servant, but also to his frauds, if committed within the scope of his authority. The principle of his liability has been rested on the ground that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved (*x*). Another ground has been suggested, namely, "that every person who authorizes another to act for him in the making of any contract, undertakes for the absence of fraud in the execution of the authority given" (*y*). Knowledge of the servant has been held to be knowledge of the master so as to bind him (*z*). Yet another ground has been suggested, namely, the negligence of the master; in other words, the master has been guilty of a breach of duty towards his neighbour; for it is the duty of every person in the pursuit of his own affairs to take care that he inflicts no injury upon the persons or property of others, and the principle of the maxim *sic utere tuo ut alienum non lædas* should apply (*a*).

(*t*) *Engleheart* v. *Farrant and Lipton*, [1897] 1 Q. B. 240; 66 L. J. Q. B. 122.
(*u*) See *Coupé Co.* v. *Maddick*, [1891] 2 Q. B. 413; 60 L. J. Q. B. 676.
(*x*) Per Willes, J., in *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259, 265; 36 L. J. Ex. 147.
(*y*) Per Bramwell, B., in *Weir* v. *Bell*, 3 Ex. D. 238, 245; 47 L. J. Ex. 704.
(*z*) *Baldwin* v. *Cassella*, L. R. 7 Ex. 325.
(*a*) Rob. & Wall. Duty and Liability of Employers, 2.

Civil Liability.—A master is liable for the act of his domestic or menial servant, whether it be one of omission or commission, whether negligent (*b*), fraudulent, or deceitful, or even if it be an act of positive malfeasance or misconduct, if it be done in the course of his employment (*c*); or with the express or implied direction or assent of his master, however much the servant may abuse his authority (*d*). He may be liable if false and defamatory words are spoken by the servant with his authority and consent (*e*); but such authority must be direct (*f*). He is in general liable for all the consequences that may arise from the misconduct of his servant (*g*). But apart from his own negligence he is not liable for the criminal acts of his servant if such are done out of the ordinary scope of his employment (*h*); thus the mere relation of master and servant does not operate as an implied warranty of the honesty of the servant (*i*). He is also liable for the acts of servants who are selected or appointed by him, but who are not under his immediate control (*k*). In cases of sudden necessity or emergency a servant would seem to have the implied authority to appoint another person to act as his master's servant if he is unable to communicate with his employer, and in such a case the master would be rendered liable for any negligent act of the person so appointed as his servant (*l*). It sometimes happens that it is a question of great nicety to decide who is the master of the person employed, whose act has given rise to the alleged liability. A fair test of the question is the exclusive and permanent control exercised over the servant; he who has the permanent and exclusive control over the servant would in most instances be deemed to be the master, though at the particular moment of the act complained of the servant was under the control and orders of a temporary employer. It was not settled law for some time that a coachman

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(*b*) See *Abraham* v. *Bullock*, 86 L. T. 796.

(*c*) Story, Agency, 452.

(*d*) *Bayley* v. *Manchester, Sheffield and Lincolnshire Railway Co.*, L. R. 8 C. P. 148; 42 L. J. C. P. 78.

(*e*) Odger's Lib. & Sl. 411—415.

(*f*) *Harding* v. *Greening*, 8 Taunt. 42.

(*g*) But see *Greenland* v. *Chaplin*, 19 L. J. Ex. 293.

(*h*) *Cheshire* v. *Bailey*, [1905] 1 K. B. 237; 74 L. J. K. B. 176; and see *Sanderson* v. *Collins*, [1904] 1 K. B. 628; 73 L. J. K. B. 358.

(*i*) *Cheshire* v. *Bailey* (*ubi sup.*).

(*k*) *Pitts* v. *Kingsbridge Highway Board*, 25 L. T. 195. The American law seems to be the same on this point: *Lowell* v. *Boston Railway Co.*, 23 Pick. 24. See also *Booth* v. *Mister*, 7 C. & P. 66, in which a master was held liable for the acts of a stranger whom his servant had requested to act in his place.

(*l*) *Gwilliam* v. *Twist*, [1895] 2 Q. B. at page 88.

with a carriage or horses on the job was *not* the servant of the hirer. In an early case in which the point arose, *Laugher* v. *Pointer* (*m*), the judges were equally divided; and it was not until *Quarman* v. *Burnett* (*n*) that the point was set at rest. In *Laugher* v. *Pointer*, the defendant, the owner of a carriage, hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to the plaintiff. In *Quarman* v. *Burnett*, the defendants were the owners of a carriage, who were in the habit of hiring horses from the same person, to draw it for a day or a drive, and the owner of the horses provided a driver, through whose negligence an injury was done to the plaintiff. In this case it was held to make no difference that the defendants had always been driven by the same driver, he being the only regular coachman in the employ of the owner of the horses, or that they had always paid him a fixed sum for each drive; or that they had provided him with a livery which he left at their house at the end of each drive, and that the injury in question was occasioned by his leaving the horses while so depositing the livery in their house. This decision was grounded on the principle that where the relation of master and servant does not exist, the liability from that relation cannot arise (*o*). If however, the temporary *dominus* orders, or sanctions, or adopts the act of his servant for the time being, he renders himself liable for the result of his conduct (*p*). Occasional employment of the servant will render the master liable (*q*). But if a person lends his servant temporarily to another for a particular employment, the servant for anything done in that particular employment must be considered as the servant of the man to whom he is lent, though he remains the general servant of the person who lent him (*r*).

The master is liable for the fraud of his servant committed in the ordinary course of his employment, but not where it is committed outside the scope of his authority (*s*).

A master is liable for every wrong of his servant committed

(*m*) 5 B. & C. 547.

(*n*) 6 M. & W. 499. In this case the opinion of Abbott, C.J., and Littledale, J., in *Laugher* v. *Pointer*, was adopted.

(*o*) This decision was approved and followed in *Jones* v. *Corporation of Liverpool*, 14 Q. B. D. 890; 54 L. J. Q. B. 345; and see *Waldock* v. *Winfield*, [1901] 2 K. B. 596; 70 L. J. K. B. 925.

(*p*) *M'Laughlin* v. *Prior*, 4 M. & G. 88.

(*q*) *Goodman* v. *Bennett*, 3 C. & P. 167.

(*r*) *Donovan* v. *Laing, &c., Syndicate*, [1893] 1 Q. B. 629; 63 L. J. Q. B. 25.

(*s*) *Coleman* v. *Riches*, 24 L. J. C. P. 125.

by him in the course of the service, and for the master's benefit, though no express command or privity of the master be proved; and there is no distinction between fraud and any other wrong (*t*). If the servant, to further the interests of his employer, and substantially in the execution of his orders, commits a tortious act in the course of his employment, and exceeds his instructions, or altogether departs from them, the master is not relieved by reason of his having given orders that the servant should do his work properly, and should not cause injury to other persons (*u*). The giving such orders is quite immaterial; but if the master has enjoined his servant not to do a particular act, and the servant not in the course of his employment or duty does it, and thereby causes injury to another, the former will not be liable (*x*). The master has been held liable in the following instances for the acts of his servant done or suffered to be done by him in the course of his employment; where a servant is driving a horse which runs away and does damage (*y*); where he executes his master's orders with reasonable care and does damage (*z*); where he does an injudicious act and damage results (*a*); where he drives a cart on business of his master, then makes a *détour* and does damage (*b*). He is liable even where the conduct of the servant acting within the scope of his employment is wanton, violent, and causes injury (*c*). He, too, is liable where being bailee of an article, his servant by his negligence injures it, though the injury is caused by an act of the servant done contrary to his master's orders (*d*). The drunkenness of the servant is equivalent to the negligence of the master for which he will incur liability (*e*). He is also liable if he expressly order the servant to commit a trespass, or the trespass is the natural or necessary consequence of the act ordered to be done (*f*); and in such a case,

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(*t*) *Mackay* v. *Commercial Bank of New Brunswick*, L. R. 5 P. C. 31; *Weir* v. *Bell*, 3 Ex. D. 238; 47 L. J. Ex. 704; *Cargill* v. *Bower*, 10 Ch. D. 502; 47 L. J. Ch. 649. See *Dyer* v. *Munday*, [1895] 1 Q. B. 742; 64 L. J. Q. B. 448.

(*u*) *Betts* v. *De Vitre*, L. R. 3 Ch. App. 441; 37 L. J. Ch. 325.

(*x*) *Stevens* v. *Woodward*, 6 Q. B. D. 318; 50 L. J. Q. B. 231.

(*y*) *Chandler* v. *Broughton*, 1 C. & M. 29.

(*z*) *Gregory* v. *Piper*, 9 B. & C. 591.

(*a*) *Croft* v. *Alison*, 4 B. & Ald. 590.

(*b*) *Joel* v. *Morrison*, 6 C. & P. 501; *Whatman* v. *Pearson*, L. R. 3 C. P. 422.

(*c*) *Seymour* v. *Greenwood*, 30 L. J. Ex. 327. In this case the guard of an omnibus, in removing therefrom a passenger whom he deemed to be drunk, forcibly dragged him out, and threw him upon the ground, whereby he was seriously injured.

(*d*) *Coupé Co.* v. *Maddick*, [1891] 2 Q. B. 413; 60 L. J. Q. B. 676.

(*e*) *Wanstall* v. *Pooley*, 6 Cl. & Fin. 910 *n.*

(*f*) *Gregory* v. *Piper* (*ubi sup.*).

the presence or absence of the master at the time of the committing of the trespass would be immaterial. But his presence or absence would become material where the servant has committed a trespass, or done any wrongful act without his orders; for, if he be absent he is not responsible; and unless there is evidence of the concurrence of his master's will in the act of the servant, he cannot be treated as a trespasser for the act of his servant (*g*). But if he be present, his presence may be taken to presume concurrence, for knowing his servant was about to commit a trespass, yet he forbore to exercise his power and control over him (*h*). It is, then, the wrongful or negligent act of the servant while engaged in some employment or service on behalf and in consequence of the orders of his master, that creates the responsibility of the latter; and in cases involving this question, the most serious dispute is as to whether the servant was or was not acting on behalf and with the authority of his master, and it is rightly the province of the jury to determine the matter (*i*).

The principles of the law on this subject, so far as they are within the scope of this treatise, are well illustrated by the cases dealing with the negligent and improper driving of servants. The distinction between the liability and non-liability of the master for his servant's act has been thus laid down: If a servant driving a carriage, in order to effect some purpose of his own *wantonly* strike the horses of another person, and produce the accident, the master will *not* be liable. But if, in order to perform his master's orders, he strikes but *injudiciously*, and in order to extricate himself from a difficulty, that will be negligent and careless conduct for which the master will be *liable*, being an act done in pursuance of the servant's employment (*k*). If a servant, being on his master's business, take a *détour* with a carriage for some purpose of his own (as to see a friend, or do shopping for himself), and drive negligently, and cause damage, the master *must answer* for his act, on the ground that as he has intrusted the servant with the control of the carriage, it is no answer that he acted improperly in the management of it (*l*). But the *détour* or deviation must occur on a journey on which the servant has originally started on his

(*g*) *M'Manus* v. *Crickett*, 1 East, 106.
(*h*) See *Chandler* v. *Broughton* (*ubi sup.*).
(*i*) *Patten* v. *Rea*, 26 L. J. C. P. 235.
(*k*) *Croft* v. *Alison*, 4 B. & A. 590.
(*l*) *Joel* v. *Morrison*, 6 C. & P. 501; *Booth* v. *Mister*, 7 C. & P. 66.

master's business (*m*); in other words, he must be in the employ of his master at the time of committing the tortious act (*n*). He will be *exonerated* if his servant, "on a frolic of his own," take his carriage without his consent of knowledge, and use it so negligently as to be productive of loss and damage (*o*). A master is also liable for the tortious acts of his servant which he adopts and ratifies (*p*); but the acts must be done for his use and benefit (*q*). No rule of law can be laid down as governing the liability in such cases of the general master or the particular master of the servant; it is really a question of fact in each case. There is one important test, however, and that is the right to exercise control over the servant at the time of the accident; if it exists in the general master then the particular master is not liable for the consequences of the servant's negligence (*r*).

Fraud of Servant.—A master is not liable for the dishonesty of his servant, if he has been guiltless of any misfeasance, for he does not insure the honesty of his servant (*s*); neither is he liable for a fraudulent act of his servant, where the latter was acting beyond the scope of his authority or ordinary course of employment (*t*); in other words, where the act of the servant is not within the scope of his authority or incident to the ordinary duties of his employment, and no negligence is shown on the part of the master, then he will not be held liable (*u*); thus, he is not liable where the servant exceeds or departs from his instructions, and does an act unnecessary for the protection of his property (*x*).

Wilful Injury by Servant.—Again, it has been held that a wilful injury inflicted by a servant, though done in the course

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(*m*) *Sleath* (*or Heath*) v. *Wilson*, 9 C. & P. 607.
(*n*) See *Mitchell* v. *Crassweller*, 22 L. J. C. P. 100.
(*o*) *Joel* v. *Morrison* (*ubi sup.*); *Mitchell* v. *Crassweller* (*ubi sup.*).
(*p*) See *Wilson* v. *Tummon*, 6 Scott, N. R. 894.
(*q*) *Wilson* v. *Barker*, 4 B. & Ad. 614.
(*r*) *Jones* v. *Scullard*, [1898] 2 Q. B. 565; 67 L. J. Q. B. 895; and see *Rourke* v. *White Moss Colliery Co.*, 2 C. P. D. 205; 46 L. J. C. P. 283.
(*s*) *Holder* v. *Soulby*, 29 L. J. C. P. 246. This was a case of a lodging-house keeper. But see *Dansey* v. *Richardson* (3 El. & Bl. 144), where the Court was equally divided on the question whether a boarding-house keeper was liable for the *negligence* of his servant. The undoubted responsibility of an innkeeper for the honesty of his servants is based upon his common law insurance of the safety of the goods of his guests.
(*t*) *Coleman* v. *Riches*, 24 L. J. C. P. 125.
(*u*) *Stevens* v. *Woodward*, 6 Q. B. D. 318; 50 L. J. Q. B. 231.
(*x*) *Allen* v. *L. & S. W. Ry. Co.*, L. R. 6 Q. B. 65; 40 L. J. Q. B. 55; *Charleston* v. *London Tramways Co.*, 36 W. R. 367; *Stevens* v. *Hinshelwood*, 55 J. P. 341; *Hanson* v. *Waller*, [1901] 1 Q. B. 390; 70 L. J. K. B. 231.

of his employment (*y*), or a wilful or illegal and authorized (*z*) act of the servant will not render the master responsible for its consequences (*a*). Where a housemaid set fire to a smoky chimney in order to clean it, whereby she burnt down the house and caused damage, her master was held not liable (*b*). But this statement must be qualified by the fact that if the wilful and criminal act is done by the servant in the course of his service to further the interests and for the benefit of his master, the latter is liable (*c*). He is not liable where the tort or injury was the result of an accident on the part of the servant (*d*).

If a servant in the course of his master's employ do a wilful injury, the servant and not the master is liable; for, under ordinary circumstances, the authority of the agent is limited to that which is lawful. If in seeking to carry out the purpose of his employment he oversteps the law, he outruns his authority, and his principal will not be bound by what he does (*e*).

Criminal Liability.—It is clear that the master may also be criminally liable for all acts of a criminal nature which he has expressly authorized his servant to commit. When a criminal act has been committed by persons who stand to each other in the relation of master and servant, in the eye of the law that relation ceases, and as regards the offence they are on the same level, and are treated as such; each must stand or fall by his own act. If a master order a servant to do an illegal act, the servant may justifiably refuse to carry out his orders; and if he elect to obey them, he does so at his own risk. To make a master criminally liable for the acts of his servant, he must have expressly ordered them, or personally co-operated in their commission. So, if a master employ a servant to do a thing which may be done in several ways, criminal and innocent, and the servant does it in a criminal way, the master is not liable, for no man who is an agent for a legal purpose can make the principal responsible for an illegal act, unless the principal has, in some way directly or indirectly, authorized it (*f*).

(*y*) *Gordon* v. *Rolt*, 18 L. J Ex. 432.
(*z*) *Lyons* v. *Martin*, 8 A. & E. 512; *Richards v. West Middlesex Waterworks Co.*, 15 Q. B. 660; 54 L. J. Q. B. 551.
(*a*) *M'Manus* v. *Crickett*, 1 East, 106.
(*b*) *Mackenzie* v. *Macleod*, 10 Bing. 385.
(*c*) See *Limpus* v. *London General Omnibus Co.*, 32 L. J. Ex. 34; *Munday* v. *Dyer*, [1895] 1 Q. B. 742; 64 L. J. Q. B. 448.
(*d*) *Harding* v. *Barker*, 37 W. R. 78.
(*e*) *Wilson* v. *Rankin*, 35 L. J. Q. B. 87.
(*f*) *Cooper* v. *Slade*, 6 H. L. Cas. 793.

CHAPTER VIII.

LIABILITY OF SERVANTS TO THIRD PERSONS.

A SERVANT can, like any other agent, so act as to render himself liable, though when acting ordinarily, as an agent for his master, he is not liable.

A servant may render himself liable (i) on contracts made on behalf of the master; (ii) for torts committed on behalf of the master.

On Contracts.—A servant will render himself liable when, on entering into the contract, he does something wrong, or omits to do something right; thus, if he exceed his authority, or fraudulently misrepresent it, he will be held personally responsible (*a*); provided the person with whom he contracts is unaware of his agency (*b*). The servant can also render himself liable by contracting in his own name (*c*), and it may not be a useless caution to servants to remind them that if they are contracting in their own names, they should use apt words to describe their procuratorial capacity, as "agent for," or "*per procurationem*" (*per proc.*). A servant having an authority to contract which is revoked without his knowledge, as by the death of the master, would not be liable on a contract which was within the scope of his authority (*d*).

The remedy against a servant who has contracted without authority, is either an action for the deceit, as a tort, or on an implied warranty that he possessed the authority he professed to have (*e*), on the principle that "persons who induce others to act on the supposition that they have authority to enter into a binding contract on behalf of third persons, on it turning out that they have no such authority, may be sued for damages for the breach of an implied warranty of authority" (*f*).

For Torts.—The servant is not in general liable for acts of negligence or non-feasance, or omissions of duty on his part in

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(*a*) See *Smout* v. *Ilbery*, 12 L. J. Ex. 357.
(*b*) *Paterson* v. *Gandasequi*, 15 East, 62; 2 Sm. L. C. 341.
(*c*) *Smout* v. *Ilbery* (*ubi sup.*); *Blades* v. *Free*, 9 B. & C. 167.
(*d*) *Cherry* v. *Colonial Bank of Australasia*, 38 L. J. P. C. 49.
(*e*) *Polhill* v. *Walter*, 3 B. & Ad. 114.
(*f*) Per Cockburn, C.J., in *Richardson* v. *Williamson*, L. R. 6 Q. B. 276, 279; 40 L. J. Q. B. 145.

the course of his employment (*g*). But the principle of law that in torts all the tort-feasors are principals, renders a servant responsible for misfeasances on his part; and in an action against him for the tort it is no defence to urge that he acted under the orders and for the benefit of his master; for in torts there is no question of degrees of blame and liability (*h*). In respect of non-feasances, or mere neglects in the performance of duty, the responsibility must therefore form some express or implied obligation between parties standing in privity of law or contract with each other, and no man is bound to answer for any such violations of duty or obligation except to those to whom he has become directly bound or amenable for his conduct (*i*). Where a servant converts goods for the benefit of his master, he will be liable for the wrongful conversion (*k*); but he has been held quit of liability on making a qualified refusal to deliver up goods to the true owner, and referring him to his master, for such mere refusal was held not to amount to a conversion (*l*). So also, a servant is no doubt liable for a joint fraud committed by him with his master (*m*). The latter is clearly liable, and seemingly the former is likewise. In the case of *Cullen* v. *Thompson's Trustees* (*n*), it was asked by Lord Westbury: "Can it be maintained as a proposition of law that a servant who knowingly joins with and assists his master in the commission of fraud is not civilly responsible for the consequences. All persons directly concerned in the commission of a fraud are to be treated as principals. No party can be permitted to excuse himself on the ground that he acted as the servant of another; and the reason is plain, for the contract of agency or of service cannot impose any obligation on the agent or servant to commit or assist in committing a fraud."

The servant is liable, if he *knowingly* commit a fraud in his master's business, to answer for it to the party injured, and cannot shelter himself under his master's responsibility, although authorized by his master to commit the fraud; for, as observed by Mr. Justice Story (*o*), it is an illegal act, and contrary to

(*g*) *Lane* v. *Cotton*, 12 Mod. 472, 488; Story, Agency, s. 308.
(*h*) *Sands* v. *Child*, 3 Lev. 352; *Lane* v. *Cotton* (*ubi sup.*); *Perkins* v. *Smith*, 1 Wils. 328; *Stephens* v. *Elwall*, 4 M. & S. 459.
(*i*) Story, Agency, s. 309.
(*k*) *Cranch* v. *White*, 1 Scott, 314.
(*l*) *Mires* v. *Solebay*, 3 Mod. 342; *Lee* v. *Robinson*, 18 C. B. 599; *Lee* v. *Bayes*, 25 L. J. C. P. 249.
(*m*) See *Cullen* v. *Thompson's Trustees*, 4 Macq. H. L. Cas. 424.
(*n*) P. 432.
(*o*) Agency, s. 310.

sound morals. It is indeed laid down in Rolle's Abridgment (*p*) that if the servant of a tavern sell bad wine knowingly, no action lies against him, for he only did it as a servant. But that proposition has been frequently doubted by text-writers, and would seem to be contrary to the principle that the command of the master has been held no justification of a *misfeasance* on the part of the servant (*q*). But if a domestic servant put in charge of a weak and impotent person obeys his or her master in an act of *non-feasance*, *e.g.*, not supplying the person with proper food and medicine, and in consequence of neglect the person dies, he not having committed a breach of any legal duty, would not be liable to conviction for murder or manslaughter (*r*).

Criminal Liability.—In crimes as well as torts, it may be laid down as a general proposition that all are equally liable for their acts, and cannot shift upon the shoulders of others the burden of responsibility. If a man knowingly engage in the commission of a crime, it does not lie in his mouth to say he was only a servant, and acting under his master's direction and orders; for, *ex hypothesi*, such orders were illegal, and need not have been obeyed. Thus, if a nurse, in carrying out the orders of her master or mistress knowingly cause the death of a child, she may be convicted of murder or manslaughter, as the circumstances of the case are proved. But if the servant be an innocent agent for the commission of an act which is not palpably illegal, and which he honestly carries out in the discharge of the directions of his master, and acts *bona fide* in obedience to those orders which he deems himself bound to obey, he will not, it is submitted, be personally answerable (*s*). In such a case it is sometimes a matter of difficulty to decide whether the act of the servant is altogether that of his master, or independent of him; if the former, the servant is irresponsible (*t*), but the contrary, if it is one that may be deemed the act of the servant alone (*u*). If a servant actively participate with his master in the commission of an offence, as, for instance, harbouring prostitutes in a place of public resort, of course he may be committed as an aider and abettor (*x*).

(*p*) 1 Roll. Abr. fol. 95.
(*q*) Smith, M. & S. 266.
(*r*) See *Reg.* v. *Staunton and Rhodes*, Times, November 9, 1877.
(*s*) *Reg.* v. *James*, 8 C. & P. 131; *Reg.* v. *Bleasdale*, 2 C. & K. 768.
(*t*) *Rex* v. *Taylor*, 15 East, 460.
(*u*) *Ex parte Sylvester*, 9 B. & C. 61.
(*x*) *Wilson* v. *Stewart*, 8 L. T. 277.

CHAPTER IX.

OFFENCES BY SERVANTS.

Larceny and Embezzlement.—The commonest offence dealt with in any Court of justice is theft; and a large number of thefts or larcenies are committed by servants. There is also another offence, which is not of infrequent occurrence, namely, embezzlement, which can only be committed by one in the position of a clerk or servant.

Larceny has been defined to be "the wrongful or fraudulent taking (*contrectatio*), and carrying away (*asportatio*), by any person of the mere personal goods of another, from any place, with a felonious intent to convert them (*animus furandi*) to his (the taker's) own use, and make them his own property, without the consent of the owner (*a*).

The Larceny Act, 1916 (*b*), defines larceny by saying that a person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen, with intent, at the time of such taking, permanently to deprive the owner thereof, and he may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof if being a bailee he fraudulently converts the same to his own use. The expression "takes" includes obtaining possession by finding, and "carries away" includes removal of the thing from the place it occupies. Everything which has value and is the property of any person is capable of being stolen (*c*). Every person who, being a servant, steals any chattel, money or valuable security belonging to or in the possession of his master, or fraudulently embezzles the whole or any part of any chattel, money or valuable security, delivered to or received or taken into possession by him for or in the name of or on the account of his master, shall be guilty of felony (*d*).

The distinction between the two offences, which has been very finely drawn at times and difficult of interpretation, is

(*a*) 2 East, P. C. c. 16, s. 2, p. 553.
(*b*) 6 & 7 Geo. V., c. 50.
(*c*) Sect. 1.
(*d*) Sect. 17.

simplified by the above definitions being provided, but has become of little practical importance in view of a later provision of the Act under which, if on the trial of an indictment for embezzlement it is proved that the prisoner stole the property in question, the jury may find him guilty of stealing, and he is thereupon liable to be punished accordingly, and if indicted for stealing he may be found guilty of embezzlement or of fraudulent application or disposition as the case may be, and be punished accordingly (*e*).

Under the provisions of the Indictments Act, 1915 (*f*), two or more felonies or two or more misdemeanours may be joined in the same indictment (*g*), and large powers of amendment of indictments are conferred upon the Court (*h*).

Searching Boxes of Servant.—When a master has missed some of his goods, and suspicion falls on a servant of having taken them, a claim of right is often made to search the boxes of the suspected servant. If the servant allows the search to take place, there is nothing irregular or illegal in the act, but where he does not assent to or refuses permission for the search to be made, and the master insists on it, then the latter is guilty of a trespass and may be cast in damages, for there is nothing in the relation of master and servant that confers that right and privilege on the master. If he has good ground for suspecting that the servant is dishonest and has concealed the stolen articles in his or her box or other receptacle, then the right course for the master to pursue is to go before a magistrate and lay an information and apply for a search warrant; and if he has acted with *bona fides* in his application he will be able to defend successfully an action for trespass at the suit of the servant (*i*). The master may also call in the aid of a police officer, and allow him to take such course as he thinks fit on the information afforded him, for an officer of the law is more protected, if reasonable evidence of suspicion is forthcoming (*k*). In any other case the permission of the servant should be obtained. An allegation in the information of reasonable suspicion of larceny is sufficient, and it is not necessary to state in so many words that a larceny

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(*e*) Sect. 44.
(*f*) 5 & 6 Geo. V., c. 90.
(*g*) Sect. 4.
(*h*) Sect. 5.
(*i*) See *Brown* v. *Chapman*, 6 C. B. 365.
(*k*) See *Grinham* v. *Willey*, 4 H. & N. 496; 28 L. J. Ex. 242; *Davis* v. *Russell*, 5 Bing. 354.

has been committed, or to specify the particular goods for which the warrant is sought (*l*).

Burglary by Servants.— The offence of burglary, which is the breaking and entering of a house in the night with intent to commit a felony, may be committed by a servant, though living in his master's house, and "the opportunity afforded him of doing it with greater ease rather aggravates than extenuates the guilt" (*m*). Thus, where a servant conspired with a thief to rob his master, and let him into the house by night for that purpose, both servant and stranger were held rightly convicted of burglary (*n*). It is not necessary that the breaking should be from the outside on the part of the servant; and if he attempt in the night-time to open a secured door of one of the rooms for the purpose of committing a felony, whether it be with intent to commit a rape (*o*), or larceny, he may be convicted of burglary.

(*l*) *Jones* v. *German*, [1897] 1 Q. B. 374; 66 L. J. Ch. 282.
(*m*) 4 Bl. Com. 227.
(*n*) *Rex* v. *Cornwall*, 2 Stra. 881; but see *Reg.* v. *Johnson*, C. & M. 218.
(*o*) *Rex* v. *Gray*, 1 Stra. 481.

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